

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**VOLVO GROUP
NORTH AMERICA, LLC**
Respondent

Cases 15-CA-179071
15-CA-184912
15-CA-195183
15-CA-204842

and

WALTER EVANS,
an Individual

William Hearne, Esq.
Counsel for the General Counsel

Charles P. Roberts, III, Esq.
Counsel for Respondent

**DECISION
STATEMENT OF THE CASE**

SHARON LEVINSON STECKLER, ADMINISTRATIVE LAW JUDGE. This case was tried in Memphis, Tennessee during 5 days in July, August, and September 2018. Charging Party Walter Evans, an individual (Evans), filed charge 15-CA-179071 on June 27, 2016, and amended the charge on August 17, 2016; General Counsel issued complaint on November 29, 2016. On September 23, 2016, Evans filed charge 15-CA-184912. General Counsel issued a consolidated complaint and an erratum respectively on December 27 and December 28, 2016. On March 21, 2017, Evans filed charge 15-CA-195183 and then filed first and second amended charges respectively on May 30, 2017 and August 22, 2017. General Counsel issued a second consolidated complaint on September 28, 2017. Evans filed charge 15-CA-204842 on August 22, 2017 and amended the charge on November 30, 2017. General Counsel issued a third consolidated complaint on April 30, 2018. Respondent filed timely answers.

The ultimate complaint alleges that Evans engaged in protected and/or union activities, for which Respondent gave him a written warning, suspension, and two terminations in violation of Section 8(a)(1) and (3) of the Act. It also alleges that Respondent gave the termination in retaliation for Evans filing charges with the Board, in violation of Section 8(a)(4). Lastly, the complaint alleges that Respondent violated Section 8(a)(5) by unilaterally changing the buzzer alert system that tells employees when to stop working in preparation for scheduled breaks, lunches, and the end of the workday, decreasing the time in which employees had to prepare for break.

The parties were given a full opportunity to participate in the hearing,¹ to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire

¹Abbreviations in this decision are: "Tr." for transcript; "GC Exh." for General Counsel exhibit; R. Exh." for Respondent exhibit; "Jt. Exh." for joint exhibit; "GC Br." for General Counsel brief; and "R. Br." for Respondent brief. Tr. 362-363 misidentifies the speakers. The witness answers are labeled as "Judge Steckler" but are the witness answers.

record, including my observation of the demeanor of the witnesses, and after carefully considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT²

I. JURISDICTION

Volvo Group North America, LLC, a limited liability corporation, with an office and place of business in Byhalia, Mississippi, receives and ships automotive vehicle parts at its facility where it annually purchased and received goods valued in excess of \$50,000 from states other than the State of Mississippi. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the United Automotive Workers and its local, Local 2406 (Union) are a labor organization within the meaning of Section 2(5) of the Act.

II. RESPONDENT'S WAREHOUSE OPERATIONS

Respondent operates a central distribution warehouse for truck parts in Byhalia, Mississippi. Respondent operated a warehouse in Memphis, Tennessee until 2014, when it relocated to Byhalia. The Byhalia facility is approximately 1 million square feet and significantly larger than the Memphis facility. Respondent also relocated other warehouse operations across the country and a number of employees transferred from these locations to the Byhalia warehouse. At the time of hearing, Respondent employed approximately 500 persons working in this location.

The warehouse has main aisles that permit two-way traffic. The aisles on either side of the main aisles, where parts are put away and retrieved, primarily have one-way traffic in alternating patterns with aisles in the middle, or "tunnels," to permit access to the adjacent aisle traveling in the opposite direction. These aisles are numbered and coordinate with directions to the industrial workers to put away or obtain parts.

² Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303-305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972).

Industrial workers operate various motorized vehicles in their duties. The equipment includes standing counterbalances, reach trucks and operating platforms called order pickers. Reach trucks have a forklift mechanism in the front and are used to put heavier parts away in high level racks.

Industrial workers receive training and certification for each piece of equipment they operate. New employees receive 3 days of training. Industrial workers receive retraining or refreshers every 3 years and may have additional training if they have had an accident or have been out of the workplace for a period. (Tr. 651.) The training includes review of the equipment safety rules and, if retraining from an accident, how the accident might have been avoided. Employees are trained to operate the equipment in reverse. Workers are permitted to back in and out of parking and charging spaces. However, employees also are instructed not to back in and out of aisles. Part of the certification process requires a trainer to observe the individual driving the equipment.

The warehouse has inbound and outbound distribution, a dock area and Mack truck parts. Employees from the bulk area on the dock load trains pulled by tuggers. The tuggers take the trains to the specific areas in the middle of the warehouse. (Braggs, Tr. 115.) The trains carry in the oldest parts first. The trains are left in the staging area and the tuggers return to the dock. The inbound personnel pick up parts from a staging area and puts parts away in the shelves. Inbound team members, not the tuggers, pick parts from the same train in the staging area at one time. Picking is performed with mechanized equipment, not by hand. The inbound team members then drive the parts and place them in the appropriate location, scanning each part as they go. The tugger and train return to the dock for reloading while the inbound workers move to the next train. If a part is placed in wrong location, error reports and multiple parts and location reports are generated. (Tr. 138.)

Outbound personnel select parts from the shelves. This work is frequently performed on an order picker. Order pickers have a forklift mechanism in the back that the workers use with a wooden crate known as an emballage, in which parts are placed after removal from the shelves. The emballages are kept in two locations, with a standby area in the shipping dock. The process starts with the industrial worker obtaining a three-sided wooden crate, or emballage. The dimensions of the emballage may vary with order size. The employees are issued cards with an order of items to be picked. The order picker also has a computer that identifies what should be the most efficient route to obtain the items. However, the computer does not identify when aisles are blocked or congested.

The workers pick the parts for the emballage and place them in the crate. Once the emballage is complete, the worker travels to a staging area. The outbound industrial worker finds a computer and scans the emballage to be shipped, then obtain the paperwork for it. The worker then takes the emballage to the shipping dock with attached paperwork and binds a top to the emballage.³ The sealed emballage is dropped off, and the outbound worker moves on to preparing and filling the next emballage.

The warehouse additionally has a bulk area, in which large parts, transmissions and engines are stored and shipped out to customers. The Mack truck parts are also kept separately in the warehouse.

³ On occasion, a worker may need a second emballage to complete an order if the first emballage is full.

Respondent measures the efficiency of the workers through metrics. Employees, using their individual identification codes, scan parts and packaging at every stage of production. The information is kept in the DLX log, which supervisors and team leads may check to see whether the industrial worker is productive or lagging. One measurement is gap time—the time between scans. Increased gap time may reflect if a worker waiting for others in the aisle, which decreases productivity. Another cause of gap time may be workers attending meetings or working more slowly than able. Respondent stressed productivity to employees in meetings weekly.

III. RESPONDENT'S MANAGEMENT TEAM FOR THE BYHALIA WAREHOUSE

During the relevant periods of events leading to Respondent's disciplinary actions against Evans, Onur Oncur was the director of the Byhalia warehouse. All managers, including the inbound and outbound managers, reported to him.

Theresa "Tess" Thomas is Respondent's human resources director for service market logistics, located at Respondent's North American headquarters in Greensboro, North Carolina. She is responsible for the human resources team in North America, including the Byhalia facility. She supervises several human resources business partners, including Curt Youngdale, the labor relations manager.

From July 29, 2016 until October 30, 2016, Lonny Otto worked as a consultant human resources business partner. He became the human resources (HR) director for the Byhalia warehouse on October 31, 2016 through the first week of this hearing. (Tr. 897.) Otto did not report directly to Youngdale but discussed matters with him. Before Otto held this position, Leslie Thompson was the Human Resources (HR) director for the facility. Duties of the HR director included ensuring the warehouse's rules and regulations were followed, taking disciplinary action when warranted, and acting as Respondent's representative in step 2 grievance meetings.

Robert Buckingham has worked for Respondent since January 2015. He first worked as an inbound supervisor on the first shift, then the third shift and changing back to first shift in early 2016. While working third shift, he supervised Charging Party Evans.

Kevin Bush, Sr. began working at the Byhalia facility in November 2014, after transferring from Respondent's Baltimore facility. He first worked in Byhalia as the operational support manager, which included maintenance and facility reconfiguration. (Tr. 1004.) He did not work with Charging Party Evans until January 2016, while he worked as both acting inbound and operational support manager. After April 11, 2016, Bush worked as the official inbound manager. While working as the acting inbound manager, six supervisors reported to Bush: Robert Buckingham, Arnold Ayikwei, Shanette Folsom and Max Sims, Lardell Shaw and Marino Camarishi. (Tr. 1006.) While Bush was acting inbound manager, Derek Hare was the outbound manager.

Bobby Clark, who worked for Respondent for 3 years, is a warehouse outbound operations supervisor for the last 2 ½ years. In spring 2017, he reported to Derek Hare, the outbound general manager. His prior position was team lead.

IV. THE COLLECTIVE BARGAINING RELATIONSHIP

Local 2406, International Union, United Automobile Aerospace and Agricultural
 5 Implement Workers of America (the Union) represents the industrial workers, including
 warehouse and clerical workers, in the Byhalia facility. Team leaders are not included in the
 bargaining unit.

Respondent and the Union entered into a collective-bargaining agreement, effective
 10 December 17, 2010 through December 16, 2020. (Jt. Exh. 1.) The Agreement prohibits any
 form of discrimination or restraint by either party against any employee due to membership or
 lack of membership in the Union. (Id. at 51, Art. 27, Sec. 2.) Section 2 of the Agreement
 15 provides that management has the right to hire, terminate, promote, or discipline for just cause
 and to maintain discipline and efficiency of employees. Respondent documents discipline in
 disciplinary action reports (DARs). Discipline for any employee who has seniority can only be
 disciplined, suspended or discharge for just cause. Disciplinary actions taken 18 months before,
 do not count for progressive discipline and “fall off.” (Jt. Exh. 1 at 37, Art. 19, Sec. 1.)

For violations of most of the Rules of Conduct, the parties agreed to 5 steps of
 20 progressive discipline: First, a verbal reminder with a notation to the record; second, a written
 reminder; third, a written warning; fourth, a 30-day suspension; and, the fifth step, termination.
 (GC Exh. 57 at 1–2.) For certain other violations, such as threatening, harassing, intimidating,
 or coercing other employees, insubordination, failure to perform job assignment in the
 25 prescribed manner, and sleeping during working hours, an employee who completed probation
 would receive at the least a 1 calendar week layoff without pay. (GC Exh. 57 at 2–3.) Serious
 violations, including but not limited to, falsifying records, theft, and fighting, warrant immediate
 discharge. (GC Exh. 57 at 3.)

When Otto joined the facility in January 2017, he directed that managers and supervisors
 30 could issue verbal warnings, written warnings, and written reprimands; if the disciplinary action
 involved suspension or termination, Otto and human resources would investigate and determine
 the appropriate level of discipline. (Tr. 925.) To issue discipline at the appropriate step, a
 supervisor or manager must request from HR information of where the individual stands with
 progressive discipline. (Tr. 962.) If an employee has no disciplinary action for 18 months,
 35 discipline is removed from progressive discipline.

The Agreement includes grievance and arbitration provisions. Article 20, Section 4
 states an arbitrator can only deal with issue(s) presented to him if fully grieved. The arbitrator
 40 does not have jurisdiction or authority to change the Agreement’s provisions “or to arbitrate
 away in whole or in part any provision of the Agreement either directly or indirectly, under the
 guise of interpretation.” The arbitrator’s decision is final and binding. The arbitrator also is
 restricted to making certain findings:

In rendering a decision involving discipline or discharge because of an
 45 alleged violation of a previously published company rule of employee conduct
 and attendance, the arbitrator will be restricted to deciding only whether or not
 the employee did in fact violate a reasonable rule.

(Jt. Exh. 1 at 40–41.)

Respondent also stresses safety. Safety is supposed to come before quality and production. Respondent and the Union maintain a joint safety committee, which should meet monthly.

V. ARE TEAM LEADS SUPERVISORS AND/OR AGENTS?

General Counsel alleges that team leads are supervisors or agents. One team lead, Arthur Braggs, allegedly demonstrated animus towards Charging Party Evans. Two current team leads, Braggs and Deadrick Simelton, and one former team lead (now supervisor) Bobby Clark, testified.

Braggs worked for Volvo since 2011 and became a team lead in 2016. He considered the team lead, which was not in the bargaining unit, a higher position than industrial worker. His pay increased approximately \$3 or \$4 per hour when he became a team leader. His team usually consists of 15 people when working the third shift. As team lead, he initially worked on either second or third shift in inbound. He oversees a put away team, the people who put freight into racks, and ensure the right product is put away and promote safety. He monitors the team by walking around and checking his laptop. (Tr. 108.) His desk is in the middle of the warehouse; he shares the desk with other team leads and supervisors.

On the day shift, Braggs now has 65 or more industrial workers on his team. Robert Buckingham and Max Sims have been his supervisors on day shift.

The collective-bargaining agreement prohibits "supervisors" from performing bargaining unit work. Team leads are not permitted to perform bargaining unit work and Braggs was the subject of a grievance when he did so. Some industrial workers received a monetary award for Braggs' work in the bargaining unit.

As a team lead, Braggs sometimes attends management meetings when the supervisor is not present. He does not fill in for the supervisor. Inbound team leads have weekly meetings with the inbound manager; supervisors do not attend these meetings. (Tr. 128.) The manager gives the team leads information about current events and future developments, which the team lead is expected to take back to the industrial workers. The information could be construction work in the warehouse, upcoming town hall meetings, visitors coming to the plant, or changes in practices. Braggs answers the industrial workers' questions if he has the information.

Deadrick Simelton serves as team lead for Mack and bulk at different times. For a period, he and another team lead had no supervisor, instead reporting directly to Kevin Bush. Deadrick Simelton is a team lead on the first shift, 6 a.m. to 2:30 p.m., in the Byhalia warehouse's bulk area. He previously worked in the Memphis warehouse as an industrial worker and served as a union chairman for 4 to 5 years. He moved to Byhalia when the facility opened and became a team lead approximately 1 year later. In March 2017, he reported to Supervisor Max Sims, who reported to Kevin Bush.

Bobby Clark also served 6 months as team lead before he became a supervisor. He worked with a team of 12 parcel pickers in outbound. Clark characterized his team lead duties as ensuring that the work was performed in a safety, productive and quality manner.

Respondent held pre-shift meetings each day; the meetings were usually conducted by the shift supervisor, but sometimes managers conducted the meetings; team leads rarely conducted meetings. The supervisor told employees generally what to do; the first shift employees were the more seasoned and knew what to do, according to employee Roderick

Simpson. (Tr. 37.) Braggs testified that he conducted daily pre-shift meetings with his team instead of the supervisor, who was not present for the meeting. (Tr. 114.)

A. Supervisory Status

1. Applicable law

Supervisory status is not applied broadly because supervisors do not have rights within the Act. *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). Section 2(11) of the Act defines a “supervisor” as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Individuals are “statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. If such authority is used sporadically, the putative supervisor will not be deemed a statutory supervisor. *Coral Harbor Rehabilitation and Nursing Center*, 366 NLRB No. 75, slip op. at 17 (2018).

Any of the 12 listed supervisory functions require the use of independent judgment. Independent judgment is defined by the ordinary dictionary meanings of the terms. The putative supervisor at least acts or effectively recommends such action “without control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood Healthcare*, 348 NLRB 686, 692–693 (2006). Judgment is not independent when the putative supervisor follows detailed instructions (e.g., policies, rules, collective-bargaining agreement requirements). *Id.* at 693. Nor does independent judgment encompass those actions beyond a “routine or clerical nature,” sporadic or perfunctory. *Id.* at 693, citing *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994). If a choice is obvious, the judgment is not independent. *Oakwood Healthcare*, 348 NLRB at 693.

In applying the *Kentucky River* 3-part test, the party asserting supervisory status, here General Counsel, bears the burden of proof. *Kentucky River*, 532 U.S. at 711–712; *Oakwood Healthcare, Inc.*, 348 NLRB at 687. Lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999). Purely conclusory evidence is insufficient to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Sears, Roebuck & Co.*, 304 NLRB 193, 194 (1991). Similarly, supervisory status is not demonstrated when evidence is in conflict or inconclusive. *Entergy Mississippi, Inc.* 367 NLRB No. 109, slip op. at 2–3 (2019).

General Counsel does not maintain that the team leads hire, transfer, suspend, lay off, recall, promote, discharge or reward the industrial workers, nor does it maintain that they effectively recommend such action. The primary functions examined are assigning, disciplining, and responsibly directing.

2. Assign

The definition of assign, per *Oakwood Healthcare*, 348 NLRB at 689, requires the individual in question to designate an employee to a place (e.g., location, department), time (shift or overtime), or giving significant overall tasks to an employee. *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2153 (2011). “Responsibility for making work assignments in a routine fashion does not make one a supervisor, nor does the assumption of some supervisory authority for a temporary period create supervisory status.” *Coral Harbor*, 366 NLRB No. 75, slip op. at 17–19 (cites omitted).

Team leads conduct pre-shift meetings. On the third shift, Braggs reported to Robert Buckingham. At the beginning of the shift, the employees understand their specific job duties; if that duty is different, Braggs told that employee what the job duty would be. On occasion, Braggs might determine that someone on the team needs to perform a special project, such as restacking boxes in the warehouse. He selects an industrial worker to perform the task based upon the worker’s temperament and experience and his assessment that the worker would perform the task correctly. (Tr. 130–131.) If Braggs needs to send a team member to work with another team, Braggs again selects based upon experience and who has obtained the necessary cross-training. Simpson testified that he had little dealing with team leaders telling him what to do. (Tr. 37.)

Simelton, with another team lead, made assignments while Respondent searched for another supervisor. They determined who would perform the work each day, based upon the priorities; however, they kept Manager Bush apprised of what they did. In making the daily assignments, the team leads based their determinations on what the workers did daily, knowing their specialties, and how well the workers performed their tasks. However, Simelton also stated that he treated all employees equally, without regard to performance. (Tr. 808–811.)

The question here is not whether team leaders designate the industrial workers to places and tasks, but whether the team leaders do so with independent judgment. *Lynwood Manor*, 350 NLRB 489, 489–490 (2007). Sending a team member to work elsewhere requires that the employee have cross-training. Knowing that requirement restricts independent judgment. *A and G, Inc., d/b/a Alstyle Apparel*, 351 NLRB at 1304.

The substitution of the team leaders for a supervisor yet to be hired is not “regular.” Regular is based upon a pattern or schedule instead of sporadic exercise. *Oakwood*, 348 NLRB at 694.⁴ Simelton’s assumption of these duties was temporary and General Counsel provides no evidence that it is likely to recur. *St. Francis Medical Center – West*, 323 NLRB 1046, 1046–1047 (1997).

I therefore conclude that General Counsel did not demonstrate that the team leaders assign industrial workers with independent judgment.

⁴ The standard for “regular” did not change with *Oakwood*, 348 NLRB at 694.

3. Discipline

5 Braggs sometimes enters the DLX log with the employee user identification to track industrial workers' production. The DLX log shows where products are located, each scan performed by a worker, the time the scan was performed for picking up the item. Braggs estimates that he spends 3 non-consecutive hours per shift checking his team members' DLX logs.

10 When Braggs finds a lag in gap time, he prints the log and takes it to the specific industrial worker, asking whether the worker was having problems and seeking an answer for the gap time. His job is to coach the employee on excessive gap time. He writes down the information from the employee (he then testified that he has the employee write the reason) but does not always share the information with the supervisor, depending on the reason for the gap
15 time. Braggs puts the information into a file of coachings. He does not share with the supervisor certain issues, such as times when the facility's wi-fi is down or reception is bad and the industrial worker may have to ride around the facility to find a location where the wi-fi is active. If Braggs determines the employee's reason is not legitimate, he reports the gap time to his supervisor because he cannot issue discipline.

20 Braggs testified that he recommends discipline. The supervisor does not always follow his recommendation. The supervisor sometimes discusses with him the reasons for and/or against discipline. (Tr. 124.) In one situation, discussed below more fully, Braggs reported to Buckingham that Evans allegedly took an early break and recommended discipline after he
25 previously documented Evans wasting time on at least two other occasions. In this instance, Buckingham issued to Evans a disciplinary action report without discussing the matter further with Evans.

30 Braggs documents and/or sends emails to his supervisor when he observes an industrial worker not performing his job. In these instances, he does not make any recommendation for discipline and whether he conversed with the worker about the issue. Braggs testified that this seldom occurs. (Tr. 126.)

35 Braggs usually does not attend disciplinary meetings. He attended two regarding Evans. Braggs also served as an acting supervisor in Ayikwei's absence, likely for more than two weeks. (Tr. 741.)

40 Clark ensured that orders flowed into his area, the parts were offloaded safely and ensured correct packing. He monitored amounts packed per hour per employee per shift through the DLX system at middle and end of shift. (Tr. 706.) If an employee's production was low, Clark checked that the employee was following processes and coach, without a supervisor's assistance, to improve production. (Tr. 706-707.) Clark did not document the coaching session but continued to monitor the employee's production. If production continued
45 to be a problem, the employee would be retrained. Only after a retraining attempt would Clark notify the supervisor that the employee's work was not efficient and further action was necessary. However, during his time as a team lead, Clark did not recall sending any notifications to supervisors about performance issues, nor doing so for a violation of the code of conduct. Clark attended no meetings with managers and supervisors. However, team leads
50 now attend the daily start-up meetings.

If a worker violates a rule of conduct, Simelton talks to the worker and notifies Bush of what happened. Simelton does not document when he coaches industrial workers. (Tr. 831.) Simelton recalled two specific incidents in which he coached employees. In the first incident, Simelton coached a worker who ran through a stop sign, and then emailed Bush. Simelton did not know whether the worker received any further disciplinary action for the incident. In the second incident, two employees could not get along and argued during the workday. Simelton coached them once and the matter did not resolve. He reported the matter to Bush, who met with the employees twice. Simelton attended one of the meetings. The matter resolved after the second meeting. Simelton did not know if the employees received discipline. Similarly, he reports safety issues, such as improper storage of items on the rack, to the supervisor.

When he supervises the trains, Simelton monitors production and gap times. If he notices unexplained gap time, Simelton asks the worker whether his day is okay and to explain the gap time. If the worker does not have a good reason, Simelton provides coaching. Simelton documents the reason for the supervisor and notes if he coached the worker.

General Counsel agrees that team leads provide coaching to employees but are not permitted to give disciplinary action. Citing *Children's Farm Home*, 324 NLRB 61 (1997) and *Hawaiian Telephone Co.*, 186 NLRB 1 (1970), General Counsel identifies the principle of effective recommendation "generally means that the recommended action is taken without independent investigation by superiors" (GC Br. at 28.) The team leads determine what information to provide their supervisors and whether to make recommendations about additional disciplinary action. However, General Counsel points to one incident in which Braggs reported and made a recommendation of disciplinary action on Evans. This example allegedly proves team leaders effectively recommend discipline.

Regarding coaching, nothing shows the coaching incidents necessarily lead to future disciplinary action. *Lucky Cab Co.*, 360 NLRB 271, 272-273 (2014). Like *Ken-Crest Services*, 335 NLRB 777, 777 (2001), an employee could receive an undetermined number of counselings without any discipline imposed. The documented counselings usually describe offenses without recommendations for discipline, which do not establish disciplinary authority. *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265-266 (2d Cir. 2000), enfg. in rel. part, 327 NLRB 253 (1998). Where reports of misconduct do not lead to discipline and contain no disciplinary recommendations, the team leader cannot be a supervisor. *Lucky Cab*, 360 NLRB at 272, citing *Franklin Home Health Agency*, 337 NLRB 826 (2002); *Passavant Health Center*, 284 NLRB 887, 889-890 (1987). As to the reportorial duties argued by General Counsel, referring problems to the supervisor alone does not equal disciplinary authority. *Coral Harbor*, 366 NLRB No. 75, slip op. at 20 (recommendations not effective or with use of independent judgment); *Riverboat Services of Indiana, Inc.*, 345 NLRB 1286, 1286 (2005).

Regarding Braggs' report and recommendation, General Counsel is "generally" correct. Buckingham gave the discipline after Braggs' report without further investigation. Otherwise, Braggs admitted that in those instances where he made recommendations for disciplinary action, the supervisor did not always follow his recommendation. One incident does not a supervisor make.

The additional incident in which Simelton tried to handle a squabble between two employees does not constitute discipline and the supervisor ultimately resolved the matter. He did not know whether the employees received discipline and apparently made no recommendation. Simelton's actions here are not disciplinary, nor are they a demonstration of a statutory authority to adjust grievances. *Coral Harbor*, 366 NLRB No. 75, slip op. at 20

(resolution of minor disputes not part of disciplinary process); *St. Francis Medical Center West*, 323 NLRB at 1048.

I therefore find that General Counsel did not demonstrate that team leads discipline or effectively recommend discipline.

4. Responsibly to direct

Direction requires that the putative supervisor has “men under him”, and deciding what to do next, but only if that direction is responsible and maintained with independent judgment. *Oakwood Healthcare*, 348 NLRB at 690–691. Direction is responsible when:

[T]he person directing and performing the oversight of the employee . . . [is] accountable for the performance of the task by the other, such that some adverse consequence may be befall the one providing the oversight if the tasks performed by the employee are not performed properly

Thus, to establish accountability for the purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Oakwood Healthcare, 348 NLRB at 691–692 (relying upon previous court definitions in *Providence Hospital*, 320 NLRB 717, 729 (1996),⁵ except if inconsistent with its decision in *Oakwood*). In performing these duties in the interest of the employer, the putative supervisor may have an adversarial relationship with the employees directed, to the “employees’ contrary interests.” *Oakwood Healthcare*, 348 NLRB at 692. The putative supervisor must be held “fully” accountable for the tasks, either through adverse actions, discipline, financial reward or loss, or some authority to correct mistakes. *Id.* at 691–692, 694–695.

General Counsel contends that Brags and Simelton, as part of the assignment function, exercised discretion in selecting employees for work based upon their “estimation of the employees work performance, experience and other factors.” (GC Br. at 28.) The missing element, however, is the requirement of holding the team leaders accountable for the performance of the team members. *A and G, Inc. d/b/a Alstyle Apparel*, 351 NLRB 1287, 1287 (2007). General Counsel presents no evidence that the team leaders are subject to adverse actions for its interactions with the team and therefore has not demonstrated exercise of this supervisory authority. *Id.*

5. Conclusion on 2(11) supervisory status for team leads

General Counsel does not demonstrate that the team leaders assign, discipline, or effectively discipline, or responsibly direct within the Board’s definitions. It therefore did not sustain its burden of proof that the team leads are supervisors.

⁵ Also see *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997), enf. 321 NLRB No. 100 (1996) (test of certification case).

B. Agency Status

5 1. Applicable law

Section 2(13) of the Act defines an agent:

10 Agency must be established regarding the specific conduct that is alleged to be unlawful.
Ace Heating and Air Conditioning Co., 364 NLRB No. 22, slip op. at 3 (2016); *Station Casino*,
 supra, citing *In re Cornell Forge Co.*, 339 NLRB 733 (2003). Common law agency principles
 determine whether an individual is an employer's agent. *SAIA Motor Freight, Inc.*, 334 NLRB
 979 (2001). The question is whether the person in question demonstrates either actual or
 15 apparent authority. *Station Casinos, Inc.*, 358 NLRB 637, 645 (2012). The burden of proof of
 agency status is upon the party asserting it—here, General Counsel. *CNP Mechanical, Inc.*, 347
 NLRB 160, 169 (2006).

For apparent authority to exist, a third party “must have a reasonable basis . . . to believe
 20 that the principal has authorized the alleged agent to perform the acts as to which agency is
 alleged.” *Poly-America, Inc.*, 328 NLRB 667, 677 (1999), *enfd. in rel. part*, 260 F.3d 465 (5th Cir.
 2001). If employees would reasonably believe that the person in question reflects company
 policy and acts upon the employer's behalf, “[a]n employer may properly be held responsible” for
 that person's conduct. *CNP Mechanical*, 347 NLRB at 169. Also see *Tortillas Don Chavas*, 361
 NLRB 101, 108 (2014). Even in the absence of specific instructions, agency status may be
 25 properly found. *Poly-America, Inc. v. NLRB*, 260 F.3d at 486–487.

2. Parties' positions

General Counsel contends that the team leaders become agents because of apparent
 30 authority. General Counsel contends an agency finding is mandated because of several of the
 same tasks already discussed result in such a finding: conducting pre-shift meetings; assigning
 work; reporting rule infractions and performance issues; monitoring work for completeness. (GC
 Br. at 29–30, citing *D&F Industries, Inc.*, 339 NLRB 618, 618–619 (2003).) The rationale is that
 35 the bargaining unit employees would reasonably believe team leads reflected company policy
 and spoke and acted for management. (GC Br. at 29–30.) General Counsel's brief particularly
 emphasized Braggs' role in recommending discipline and maintaining animus against Evans.

Respondent's short discussion contends that team leads are not agents “in any sense
 40 that has legal significance in this case.” (R. Br. at 35.) The team leads play no role in
 grievances and “are under no obligation to report union activity by employees. Not do they
 make disciplinary decisions.” *Id.* Respondent then states, “At most, the leads are agents only
 insofar as they carry out their assigned work responsibilities.” *Id.*

Neither party raises that the collective-bargaining agreement prohibits “supervisors” from
 45 doing bargaining unit work and Respondent settled grievances when Braggs performed
 bargaining unit work.

3. Analysis on agency

50 Braggs was not Respondent's agent when recommending discipline for Evans. Although
 Braggs took it upon himself to recommend certain disciplinary action, he did not do so

consistently. Like the analysis of supervisory authority, Braggs had no apparent authority to discipline, only counsel. This single incident does not create an appearance of authority to employees.

5

VI. MEET MR. WALTER EVANS, CHARGING PARTY

Evans had disciplinary actions that the complaint alleges as violations of Section 8(a)(3) and (1). The first was a written warning for allegedly going to break early, resulting in wasting time. The second was dropping windshields, for which Respondent suspended Evans for 30 days. Immediately after meeting with Respondent about the suspension, Evans allegedly threatened and cursed at Manager Bush. Respondent terminated Evans. The Union and Respondent settled the two grievances, allowing Evans to return to work after a 30-day suspension with the alleged threat and cursing remaining on his record. In March 2017, after Evans backed out of an aisle on a forklift, Respondent terminated him. The Union took the matter to arbitration, where the arbitrator upheld the termination. General Counsel maintains that Respondent's actions violated Section 8(a)(3) and the termination for backing out also violates Section 8(a)(4). Respondent contends it did not violate the Act, and even if its actions were motivated by union and/or protected activities, the Board should defer to the grievance settlement and the arbitrator's decision. This section will cover Evans' history as an industrial worker until the disciplinary actions in 2016 at issue here.

Respondent employed Evans until March 2017, when Respondent terminated him. He was employed in Respondent's Columbus, Ohio facility from August 2014 until May 2015, when he transferred to the Byhalia facility as an industrial worker. His duties included operating equipment, such as forklifts, to put away parts or to remove parts from shelving. As in Columbus, he operated reach trucks and order pickers. He worked inbound on the third shift from June 2015 until May 2, 2016. His supervisor at first was only Robert Buckingham; later Arnold Ayikwei was assigned as a supervisor to the area. Six months later, Dave Quarles also supervised him on the third shift. Evans' team lead on the third shift was Arthur Braggs. The inbound manager at the beginning was Don Mouledoux.

In August 2016, Evans began working a first shift outbound forklift position. He was working in that area when he was terminated for the second time in March 2017. Evans primarily operated a reach truck but also operated the order picker. For Evans' outbound day shift assignment, Brad Horncut was the team lead; Mark Leftwich was the supervisor and the secondary outbound supervisor was Bobby Clark.

A. Evans' Union and Protected Concerted Activities in 2015-2016

Since transferring to the Byhalia facility, Evans participated in numerous union activities. He was a member of the Union. He filed grievances regarding holiday overtime (GC Exh. 4, dated July 6, 2015) and weekend overtime hours (GC Exh. 5, dated November 15, 2015). Management responded to each of the grievances. (GC Exh. 4, 6.) The latter grievance, labeled 2015-17, also included allegations that management, particularly supervisor Robert Buckingham, gave disciplinary sanctions in an arbitrary matter and alleged safety rule violations. Evans hand-delivered this grievance to Manager Mouledoux. (GC Exh. 5; Tr. 188.) Buckingham denied the grievance on January 6, 2016. (GC Exh. 6.) However, the grievance eventually settled, with two persons receiving a monetary award for the overtime. Regarding the safety issues, Respondent assigned three persons to move heavier items to certain racks with more appropriate weight ratings. In grievance 2015-10, Evans was one of the grievants

primarily claiming that Respondent did not assign overtime by seniority. Only two persons received payment for the grievance, one of whom was Braggs, who became the team lead.

5 In 2015 and 2016, Evans distributed union-related materials to employees at the Byhalia facility. No supervisor said anything to him about the materials or the distribution. (Tr. 505.)

10 Evans became a third shift alternate committeeman in October 2015. The list of elected officials was posted on the employee bulletin board near the break rooms in the Byhalia facility. (Tr. 179; GC Exh. 3.) His duties included filing grievances on behalf of other employees. Evans always included himself in the grievances he filed. (Tr. 503.)

15 In pre-shift meetings and round table meetings, Evans frequently raised employee concerns with management and other employees. By August 2015, Evans frequently raised safety as an issue. He told Buckingham in pre-shift meetings and individual conversations that heavier items should not be stored on higher racks because of the potential for killing someone if they fell and the heavy items made the racks' steel beams bow. He also told Mouledoux about the same safety concerns and reasons during round table meetings, when other employees were present. Buckingham's responses varied. He said it was beyond his pay grade and he emailed management. He once told Evans that if the items fell, they fell. Evans was not the only employee who raised this issue. Buckingham found the suggestions helpful, leading to changing the rack system for heavy parts. Manager Bush, who was the operations support person at the time, maintained he was not involved with any changes to the racking system and was not informed of any. (Tr. 1110.)

25 In round table meetings with Mouledoux, Evans also raised that he and other employees the third shift wanted shift differential pay. (Tr. 202.) Mouledoux said he would contact Respondent's corporate office and suggested the Union should do the same. (Tr. 203.)

30 Evans' speeches in pre-shift meetings caused employees in the meeting to become riled up.⁶ Buckingham found Evans' behavior disruptive and that Evans later twisted statements. Some of these issues were related to the collective-bargaining agreement. (Tr. 762-763, 879.) Buckingham and Braggs discussed Evans' conduct in the meetings, saying Evans was "cutting up" in the meeting, getting loud and speaking out, and interrupting the meeting. (Tr. 878.) Braggs testified that Evans was always complaining about employee rights and would talk about it to anyone who listened. Evans participated in round table discussions with the same sort of results: His managers expressed displeasure that their meetings were interrupted.

B. Evans' Counseling and Disciplinary History in 2015 and Early 2016

40 On December 17, 2015, Evans, while operating a reach truck, heard a thump. The thump was an engine falling off the truck's forks. Evans maintained the engine was secured but did not get off the truck before loading it to inspect it. Evans reported the event to Buckingham. No physical injury occurred. On December 23, 2015, Evans received retraining on the reach truck. After the retraining, Buckingham gave Evans a verbal reminder for failing to comply with safety rules, regulations and failure to wear personal protective equipment. (Tr. 213-214; GC Exh. 10.) Evans told Buckingham he objected to the discipline, but apparently did not file a grievance.

⁶ "Rile," a verb, means "to make agitated and angry," or roil. See <https://www.merriam-webster.com/dictionary/rile#learn-more>.

On December 28, 2015, Buckingham documented, by email, that he observed Evans in the break room at 1:46 a.m., about 15 minutes before the scheduled break time. Evans again did not receive any discipline for this incident. For January 7, 2016, Buckingham, after reviewing the inbound department's productivity in the DLX system, emailed Braggs and Ayikwei about Evans having only 2 scans in DLX for a period, indicating lack of productivity. Buckingham did not discipline Evans. (Tr. 734-735.) On January 21, 2016, Buckingham and Ayikwei coached Evans about wasting time, which was not considered discipline. (Tr. 733.)

On February 24, 2016, Supervisor Ayikwei issued a written reminder to Evans "performing careless or poor workmanship." (GC Exh. 11.) Evans allegedly placed an item in the wrong place, known as a mispick, which Evans denied in writing. Evans testified that these errors occurred all the time. (Tr. 218.) Evans did not file a grievance on this disciplinary action. At a round table discussion, Evans raised the problem of two different systems that did not recognize each other that he maintained caused the mispick error.

VII. MARCH 2016: EVANS RECEIVES A WRITTEN WARNING FOR ALLEGEDLY WATCHING TELEVISION IN BREAK ROOM BEFORE BREAK TIME

Braggs testified that, on March 22, at 1:35 a.m., he observed Evans in the front break room. Braggs notified Buckingham and the eventual result was that Evans received a written warning. To better understand the alleged basis of the discipline, I review charging the vehicles and traveling on motorized vehicles in the warehouse, then the incident leading to the discipline, the grievance process and evidence regarding disparate treatment.

A. Vehicle Charging and Traveling in the Byhalia Warehouse

During a shift, an industrial worker may need to recharge the battery on the vehicle. The vehicle operator should observe how quickly the battery is depleted. The only charging area is approximately 20 to 30 feet away from the warehouse entrance, lined up against the wall, and about 20 steps away from the main break area. From a far spot in the warehouse, it may take 3 to 6 minutes to reach the charging stations. (Tr. 673.) Not all vehicles in need of charging might have an available charging station during break. For a reach truck or an order picker, connecting to a charger takes less than 1 minute. The closest charging spot is approximately 20 seconds from the break room and 2 minutes for the furthest. Employees are supposed to wait until the pre-break or pre-lunch buzzer to prepare for break, including charging the vehicle. This practice has not changed since 2015. If no charge is needed, employees may park vehicles in parking spots around the inbound break room the outbound break room, the main charging area, and additional spots near the main break room. At the end of shift, the vehicles are either in the charging stations or parked in the area near the charging stations. (Tr. 681.)

Traveling from the far end of the warehouse to the main break room requires traversing one of the main aisles. (Tr. 682.) The middle of the main aisles has stop signs, which would make a trip longer; traffic may stack up at the stop sign, making the trip even longer. (Tr. 683.) the top speed for some reach trucks is up to 7.8 miles per hour. (Tr. 683-684.) However, if the truck is carrying an emballage, the vehicle should be operated at a slower rate for safety.

B. Team Lead Braggs Observes Evans in the Break Room before Scheduled Break on March 22

On March 22, Braggs, starting at an unknown time, looked for Evans to discuss mislocated parts. An email, dated March 14, was sent to Braggs about the topic and Braggs apparently waited about 6 workdays to address the issue with Evans. (Tr. 867.) Braggs claimed he could not find Evans in the system. Braggs testified that he rode around the warehouse until he found Evans in the break room at 1:35 a.m. Traffic on the third shift at that time would have been light because only 15 to 20 employees worked inbound at that time. (Tr. 888-889.) For that night, break time did not start until 2 a.m.

Braggs testified that this incident was not the first time he found Evans in the break room watching television. (Tr. 137.) Braggs also denied that anyone else was in the break room with Evans. (Tr. 160, 888.) At 2:07 a.m., after returning to his desk, Braggs emailed Buckingham that he observed Evans, sitting, relaxing, and watching television in the break room at 1:35 a.m. and that Evans had no regard for the rules. Braggs testified during 2016 and 2017, workers commonly stopped work before the first buzzer to head for the break room. Evans agreed that this incident was not the first time that Braggs observed him in the break room before his normal break time. (Tr. 527.) Workers were supposed to wait for the first buzzer before making any preparations for break. (Dobson, Tr. 668.)

Shortly after 2 a.m., Evans emailed his report to Supervisor Buckingham, who was working the last segment of the third shift to cover for another supervisor. At about 2 a.m. Buckingham arrived at work. While making his initial review of emails and walking around Buckingham spoke with Braggs and received the email about Evans. Braggs told Buckingham that Evans needed disciplinary action. (Tr. 749.) Buckingham reviewed the DLX reports, which Buckingham interpreted to show Evans had a large gap time before the lunch period, starting at 2 a.m., and was not on the warehouse floor. (Tr. 724-725.) Buckingham testified that he knew warehouse traffic during 1:30 a.m. to 2:00 a.m. was light because only a few people were working the third shift and the trip on a forklift from Evans' previous location to the main break area, including time to park the vehicle, would have taken only 3 minutes. (Tr. 728-729.)

C. Evans Receives a Written Warning

Buckingham determined to issue the discipline without interviewing Evans.⁷ On the following day, March 23, Buckingham issued a written warning to Evans. (GC Exh. 12; Tr. 755.) Buckingham and Evans met in a conference room, where Buckingham handed Evans the disciplinary action report, which stated Evans violated Rule 8 for wasting time and received a written warning. (GC Exh. 12.) The initial written warning, dated March 22, 2016, reports a Rule 8 violation; the description of misconduct states: "8. Wasting time during scheduled work hours. [Industrial Worker] was in the front break room 25 minutes before Lunch sitting down watching TV." (Jt. Exh. 3 at Volvo 000036.) Buckingham stated Evans declined union representation at the disciplinary meeting.⁸

Evans disputed the report and said Buckingham was not present that night. Buckingham told Evans the report was based upon Braggs' report. Evans said the report could not be true

⁷ Buckingham testified that Respondent's practice does not always include an investigatory interview with the individual before giving disciplinary action. (Tr. 755.)

⁸ Buckingham was aware that Evans had disputes with the union representatives working the third shift, as the shop steward advised Buckingham the union did not agree with Evans' desire to file "frivolous grievances." Buckingham did not know whether he was aware of these concerns in March 2016.

because the DLX records showed he could not possibly be in the break room at the time Braggs stated. Upon Evans' request, Buckingham pulled up the DLX report (GC Exh. 13), which showed Evans had no transactions after 1:31:58 a.m.⁹ The next scan registered at 2:57 a.m. Evans protested the impossibility to transverse the warehouse from the last scan location, at almost 1:32 a.m. to arriving and sitting in the break room 3 minutes later.¹⁰ Evans also said he went to the bathroom and then got a cup of water. He was standing in the break room, not sitting as Braggs claimed. Evans acknowledged that he saw Braggs come into the break room about 1:55 a.m. but denied that Evans said anything to him. Evans testified that 10 to 15 others were in the break room with him.¹¹

Evans asked Buckingham to rescind the disciplinary action, given it was not true. Buckingham said he could not rescind it because Kevin Bush instructed him to give Evans the discipline. Buckingham further testified that Evans could have traversed the long distance in 3 minutes, particularly riding a fork truck. (Tr. 728.)

Buckingham testified that, during the meeting, Evans did not tell him it was not physically possible for him to be in the break room when Braggs stated. Buckingham testified contradictorily about when he first learned of Evans's reasons for disputing the discipline: He first testified that Evans later made loud comments in the warehouse about it, which is how he first discovered Evans' complaints; he later testified that he read Evans' comments on the disciplinary action report the same night Evans wrote it, the same shift in which Evans received the discipline. Buckingham also made no further efforts to investigate whether Evans had legitimate reasons for disputing the timing of the events.

Within the next few days after receiving discipline, Evans confronted Braggs and said he had seen the email to Buckingham. This conversation lasted approximately 30 minutes. Evans said he was not in the break room for 25 minutes before break. Evans also told Braggs that fostering hostility between management and the workers was not good for Respondent. Evans asked Braggs why Braggs singled him out. Evans said Braggs stated, "I don't have any problem with you, Evans, except when you start talking like Union stuff. You seem to go crazy when you start talking about that Union stuff." Evans told Braggs he was only talking about matters raised in the pre-shift meeting and he had a right to do so to "join in discussions about Union stuff or anything else that has been brought up by the management or the employees." (Tr. 244.) Braggs denied making any statement about the Union to Evans. (Tr. 157.)¹²

⁹ Evans also would have had to drive the reach to a designated parking area, back into the spot and plug cables into the reach's battery for recharging. (Tr. 232.)

¹⁰ Evans estimated the length of the warehouse is about the same as 4 football fields. (Tr. 229.)

¹¹ When asked if he saw Evans at the location where he scanned an item at 1:31:58 a.m. on platform 17, Braggs became defensive, although he admitted he did not check at that location for Evans. (Tr. 148–149.) According to Braggs, if Evans traveled in his reach truck from platform 17, aisle 621 to the other end of the warehouse for the changing area and break, with one stop at the main aisle for a stop sign, Evans would have still had to park his truck and plug it in to charge it. (Tr. 151–152.) Evans then would have had to walk to the break room. Braggs insisted that it was possible to make the trip in less than 3 minutes. (Tr. 152.) Braggs had no reports, however, that Evans was speeding or failed to stop at the stop sign. Given the size of the warehouse, the distance of the break room from Evans last scan, and other tasks Evans had to perform before entering the break room, I cannot credit Braggs' belief that he saw Evans about 3–4 minutes after Evans' last scan.

¹² Apparently, Evans and Braggs had some disputes. In August 2015, someone reported Braggs performed bargaining unit work. (Tr. 248–249.) On August 20, 2015, at a pre-shift meeting, Braggs raised the subject during the pre-shift meeting, stating if employees did not perform their jobs, or caused problems, he would see that people would be forced to leave and "we will lay paper on you." "Laying

Evans testified that, at a minimum, the trip would take 5 minutes to perhaps 15 minutes. (Tr. 233.) Union Committeeman Glenn Dobson, who also worked inbound, testified that employees were supposed to charge their vehicles during breaks and lunches, if needed. (Tr. 642.) However, the charging station was located at the entrance door to the warehouse near the main break room for the outbound employees; the inbound employees' break room was on the other side of the warehouse.

Evans requested union committeeman Simpson, working first shift, to represent him for filing and pursuing a grievance. On about March 30, 2016, Evans and Simpson attended a meeting with Volvo management to discuss the written warning for Evans allegedly wasting time in Inbound Manager Bush's office.¹³ Supervisors Ayikwei and Robert Buckingham also were present. Buckingham also denied attending this meeting.

In a meeting with Bush and Simpson¹⁴ on March 31, Evans stated that it was impossible for him to have been in the break room at 1:35 a.m., as Braggs claimed, based upon the DLX records Buckingham provided. Evans again explained that he waited to go to the bathroom before his break time and, up until that point, was busy with putting away parts. Simpson and Evans also argued that Respondent had not performed any investigation. Simpson asked for a copy of the investigation. Simpson also asked Respondent to rescind the discipline, which Bush said he would not do so. Bush then accused Evans of having unexplained gap times in his logs, which Evans denied. Bush cited particular dates, such as March 11. Evans asked for the records for the entire month. Bush said he would give the records to Simpson and the Union.

On cross-examination, Bush testified that Evans admitted to being in the breakroom early, but at 1:54 a.m. Bush reviewed the DLX logs for that time frame in question. (Tr. 1055-1056; GC Exh 13.) He followed up with Buckingham.¹⁵

D. Disparate Treatment Evidence

In a third-step meeting on June 30, 2016, regarding Evans' May 2016 suspension and discharge, Hayes confirmed that she investigated Evans' claim that others were in the break room with him. Hayes not only confirmed that 8 others were in the break room, she also confirmed that Evans was the only person who received discipline. (Tr. 281-282; GC Exh. 36 at 2.) Despite this revelation, Respondent took no action to change Evans' discipline. (Tr. 282.) Nor does Respondent show any of the others received coachings or other forms of discipline.

Throughout the hearing, Respondent's witnesses admitted that it had continuous problems with employees taking break early or lining up outside the break room before the appropriate times. Dobson testified that, since he became a union officer, he reviewed disciplinary records to determine whether anyone was disciplined for a violation of the buzzer system. He recalled several employees who were so disciplined.

paper" is the warehouse's colloquial term for subjecting an employee to a barrage of discipline. Braggs also expressed dissatisfaction that he was written up for performing bargaining unit work. (Tr. 249-250.) Braggs denied threatening to "lay paper." Evans seemed to assume that Braggs knew he was involved.

¹³ Evans first testified Braggs was present, then testified Braggs was not present. (Tr. 303, 538.)

¹⁴ Buckingham and possibly Braggs were in attendance, but they denied any recollection of the meeting.

¹⁵ General Counsel questioned about employees who might be working without completing scans. This possibility must be physically witnessed to determine that the worker had not completed the scan into DLX. No evidence supports this hypothetical scenario.

Buckingham recalled coaching other employees for Rule 8 violations but could not recall when he did so. Buckingham also testified that industrial workers would not receive discipline for wasting time or out of the area unless it became a pattern. Beyond counselings, Respondent issued a volume of disciplinary action for violation of Rule 8. Most of the disciplinary actions were verbal reminders for gap time violations. A few received written warnings. One employee incurred a written warning, followed by a 30-day suspension issued on May 16, 2016. (GC Exh. 38 at 26, 36.) One received a 5-day suspension and another a 7-day suspension. The union activities and/or sympathies of these employees, except for Roderick Simpson, were unknown. Simpson handled a number of grievances regarding gap time. Gray handled one or two gap time grievances.

A few employees received verbal reminders for early breaks or staying after the break room after the end of break. Two verbal reminders, to different employees, were issued on November 19, 2015. (GC Exh. 38 at 23, 24.) Another was issued on October 12, 2016.

On March 4, Braggs observed and reported to his supervisors that Tavares King for staying in the break room over his scheduled break time.¹⁶ (Tr. 848-849; R. Exh. 3.) Braggs admitted he previously observed King staying the break room too long but had not reported it; he also did not include prior observations when he reported King to management. (Tr. 875-876.) Braggs said that he reported only King and Evans for this violation because they had developed patterns. (Tr. 887.)¹⁷ Another employee, Dewayne Johnson, was given a verbal reminder on December 5, 2017 for excessive breaks. Johnson had union activity on the same day in which he took; the union time was excused. (GC Exh. 38 at 63-64.)

E. Credibility

Evans admitted he received previous verbal reminders and counseling about going to the break room before break time. Throughout the hearing, Evans had difficulty limiting his answers to the questions asked. Even without a question on the floor and regardless of who the questioner was, Evans added facts he believed relevant. He was reminded repeatedly to limit his answers to what was asked and to stay off rambling tangents. At one point, when no question was before him and Evans completed his previous answer, Evans said he wanted to add more information to his answer; the judge, General Counsel and Respondent in unison said no. Whether on the stand or at his seat next to General Counsel, Evans was prone to muttering. Although I could not always hear the specific words in the mutterings from the judge's bench, the tone sometimes was angry. This sort of behavior lent credence to Respondent's witnesses' exasperation with Evans' speeches at meetings and observations in the workplace.

Roderick Simpson, who worked for Respondent until 2017, in April and May 2016 was working first shift inbound as a picker/put away industrial worker. Some of his testimony included hedging phrases, such as "I want to say." He could not recall supervisors exactly, but believed Kevin Bush was inbound manager at the time. He also had difficulty recalling the team leads at the time.

I discredit much of Braggs' testimony, which was contradicted by himself or others. For example, regarding the circumstances surrounding why he was searching for Evans, Braggs

¹⁶ King was also late for his shift and had a safety violation reported on the same email.

¹⁷ General Counsel points out that on February 24, 2016, King filed a grievance alleging Braggs and Ayikwei created a hostile work environment and acted in a retaliatory manner. (GC Br. at 33 fn. 10, citing R. Exh. 1 at 13).

first stated he received an email about Evans making a put away error and he wanted to discuss it with Evans. He did not act on the email sooner because they did not work the weekend. (Tr. 842-844.) He then could not recall whether he read the email on March 14 or a few days later. Braggs said he must have been instructed to discuss the matter with Evans about March 22, but he previously testified that he was not sure whether he had been instructed to do so by Ayikwei, but Ayikwei had been on vacation as Buckingham was covering. When he reported Evans, Braggs did not include Ayikwei on the email. (Tr. 870-871.) Braggs never spoke with Evans about the put away issue because he saw Evans in the break room and worked on that issue instead. (Tr. 845-846.) He also reported that Evans was alone, when both Respondent's and Union's subsequent investigations revealed eight other workers were in the break room with Evans.

In another instance, in which General Counsel questioned Braggs about whether he was required to stop performing bargaining unit work, Braggs admitted he was aware a grievance had been filed about the issue. He denied that he violated the contract by performing the work, but then testified:

Q: [H]ow did you know that you weren't allowed to help them with their work anymore if no one had told you, don't do that?

A: Because it's in the contract.

Q. But you had been doing it? Yes?

A. Yes.

Q: So you had been violating the contract?

A: No.

Q: Yes?

A: No.

Q: Okay. If there isn't a contract violation, then why didn't you keep doing it?

A: Because I wasn't supposed to do it.

Q: Who told you not to do it?

A: The contract says it.

(Tr. 860-861.)

Braggs, who also attended pre-shift meetings in which Evans spoke, denied any recollection of what Evans complained about. He then admitted that Evans raised complaints about the assignment of overtime and still denied that Evans raised issues of safety. (Tr. 863.) Regarding other workers raising issues about possible violations of the collective-bargaining agreement, Braggs testified that "mostly all of them have said something at one point or another" but denied any recollection of anyone else raising a specific issue. (Tr. 865.)

Braggs testified that no other employees were in the break room with Evans. Hayes' report on June 30 confirms that others were in the break room with Evans. Braggs therefore is discredited that no one else was with him when he saw Evans in the break room. With the corroborating evidence and the bargaining notes from Hayes, I credit that Evans was not in the break room alone.¹⁸

Supervisor Buckingham testified openly about his dislike for Evans' interruptions of his meetings. He clearly recalled the events on the night/early morning when he arrived at the Byhalia warehouse and when he learned of Braggs' report. I therefore credit Buckingham's admission and that he conducted no investigation.

Manager Bush had his memory refreshed about the step 2 grievance meeting with Simpson and Evans. (Tr. 1011.) He recalled that the Union provided a list of the employees allegedly in the breakroom with Evans when he was early and who did not receive discipline. Bush stated Human Resources would have performed the investigation. (Tr. 1082.) Absent from the discussion is if Bush raised the inconsistency and asked to have the disciplinary action rescinded.

Thomas admitted adverse information about Respondent's failure to act upon learning that Evans was the only person disciplined while others were present in the break room. I generally credit her testimony about this information.

F. Discussion

1. Applicable law

General Counsel contends this disciplinary action is the result of discrimination for Evans' union activities. Respondent provides possible legitimate business reasons for its actions. In determining whether adverse employment actions are attributable to unlawful discrimination, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The *Wright Line* framework requires proof that an employee's union or other protected activity was a motivating factor in the employer's action against the employee. 251 NLRB at 1089. The elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. *Fremont-Ridout Health Group*, 357 NLRB 1899, 1902 (2011); *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enf'd. 577 F.3d 467 (2d Cir. 2009).

Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428-1429 (11th Cir. 1985). Because direct evidence of unlawful motivation is seldom available, the General Counsel may rely upon circumstantial evidence to meet the burden. See *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). A showing of animus need not be specific towards an employee's union or protected concerted activities. *Colonial Parking*, 363 NLRB No. 90, slip op. at 1, fn. 3 (2016). Animus can be inferred from the relatively close timing between an employee's protected concerted activity and his discipline. *Corn Brothers, Inc.*, 262 NLRB 320, 325 (1982) (timing of discharge within a

¹⁸ I refrain from deciding an exact time when Braggs saw Evans in the breakroom. Evans admits he was early, at a time before the first buzzer, and Braggs was not credible about the time necessary to travel from one end of the warehouse to the opposite end.

week of union organizing meeting evidence of antiunion animus); *Sears Roebuck & Co.*, 337 NLRB 443, 451 (2002) (timing of discharge, several weeks after employer learned of protected concerted activities, indicative of retaliatory motive); *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002) (timing of discipline imposed 4 months after service on bargaining team and unfair labor practice hearing appeared suspect).

Factors which may support an inference of antiunion motivation include employer hostility toward unionization, other unfair labor practices committed by the employer contemporaneous with the adverse action, the timing of the adverse action in relation to union activity, the employer's reliance on pretextual reasons to justify the adverse action, disparate treatment of employees based on union affiliation, and an employer's deviation from past practice. *Purolator*, 764 F.2d at 1429; *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995), denying rev. 311 NLRB 1118 (1993).

An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); *T&J Trucking Co.*, 316 NLRB 771 (1995). When the General Counsel's showing of a discriminatory motivation is strong, the employer bears a substantial defensive burden. *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 2 (2018). If the employer's reasons are found to be pretextual—reasons that are false or not in fact relied upon—the employer fails to sustain its burden and the inquiry is terminated. See, e.g.: *Lucky Cab Co.*, 360 NLRB 271, 275–276 (2014) (“finding of pretext defeats an employer’s attempt to meet its rebuttal burden”); *Servicios Santiarios de Puerto Rico d/b/a AA-1 Portable Toilet Services*, 321 NLRB 800, 804 (1996); *Caruso & Ciresi, Inc.*, 269 NLRB 265, 268 (1984). When pretext is found to be the case, dual motive no longer exists. *La Gloria Oil*, 337 NLRB at 1124.

2. Analysis of March 22, 2016 incident and written warning

General Counsel presents a prima facie case. Evans had union activities and complaints about safety and other working conditions, such as overtime assignments. He invoked the rights provided by the collective-bargaining agreement in the meetings with other employees present, which is considered protected concerted activity. *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 1 (2016). He interrupted meetings with his concerns, causing consternation for Buckingham.

Buckingham's concerns about Evans interruptions and “cutting up” show knowledge and animus. Respondent's annoyance with Evans does not mean he did not present concerns rooted in the collective-bargaining agreement: Buckingham testified that Evans raised many different concerns, some of which were rooted in the collective-bargaining agreement. *Union Carbide Corp.*, 331 NLRB 356, 361 (2000), enfd. 25 Fed.Appx. 87 (4th Cir. 2001); *Springhill Services*, 295 NLRB 1021, 1025 (1989) (supervisor's animus attributable to respondent employer).

Respondent failed to conduct a meaningful investigation before issuing discipline to Evans. Respondent initially failed to investigate the allegation that others were in the break room and received no discipline. Respondent blindly went forward with the discipline, even after it discovered Evans was not the only person in the break room early but was the only one who received discipline. Respondent let the discipline stand and took no action to step back from the written warning. Respondent refused to correct its error, showing discriminatory intent. See generally *Andronico, Inc. d/b/a Andronaco Industries*, 364 NLRB No. 142, slip op. at 14 (2016).

If Buckingham's animus towards Evans was not enough by itself, this chain of events demonstrates disparate treatment. Respondent reminds us:

5 . . . [I]t is well settled that the Board "cannot substitute its judgment for
that of the employer' and decide what constitutes appropriate discipline." *Detroit*
Paneling Systems, Inc., 330 NLRB 1170, 1171 n. 6 (2000); see *George L. Mee*
Memorial Hospital, 348 NLRB 327, 332 (2006). Absent proof of pretext, the
10 General Counsel's burden is to establish actual disparity, i.e., that "similarly
situated" employees received lesser discipline. *Pacific Maritime Assoc.*, 321
NLRB 822, 824 n. 7 (1996). In circumstances where cause for discipline has
been established, the Board does not question management's exercise of
discretion in deciding the appropriate level of punishment, at least absent "blatant
disparity." *Fluor Daniel, Inc.*, 304 NLRB 970, 970-971 (1991), enf'd, 980 F.2d
15 1449 (11th Cir. 1992) (Table). A "blatant" disparity is a disparity of such
proportion "as to admit of no other interpretation than that the employer bore
animus against the protected activity." *Tomatek, Inc.*, 333 NLRB 1350, 1364
(2001). It is disparity that is "completely obvious, conspicuous, or obtrusive
especially in a crass or offensive manner." *Merriam-Webster's Online Dictionary*.

20 (R. Br. at 30.)

In applying the law of "blatant" disparity here, Evans received discipline while eight
others received no discipline or counseling. This disparity is obvious and conspicuous, leading
25 to the conclusion that animus led to Respondent's decision to discipline Evans. Respondent,
having uncovered exculpatory evidence, decidedly ignored it. *NLRB v. Future Ambulette, Inc.*,
903 F.2d 140, 143-144 (2d Cir. 1990), enf'g. as mod., 293 NLRB 884 (1989) (disparate
treatment and lack of action support inference of an illegal motive). See generally *Escambia*
River Electric, 265 NLRB 973, 985-986 (1982), enf'd. 733 F.2d 830 (11th Cir. 1984).

30 Based upon Evans' activities in support of the collective-bargaining agreement,
Respondent's knowledge of those activities, and animus evident through disparate treatment,
poor investigation and Buckingham's statements, General Counsel presents a strong prima
facie case. I examine Respondent's defenses. "A finding of pretext necessarily means that the
35 employer's advanced reasons either did not exist or were not in fact relied on, thereby leaving
intact the inference of wrongful motive established by the General Counsel." *United Rentals,*
Inc., 349 NLRB 190, 198 (2007).

40 Respondent argues that Evans was disciplined not only for being in the break room
early, but also for wasting time. True, the DLX scan report reflects no scans for Evans after
break for almost 30 minutes and a number of other employees have been disciplined for wasting
time. However, what triggered the review was Braggs' report that Evans was in the break room
early. Braggs reported the incident before break shortly after 2 a.m., and the break was over at
2:30 a.m. Respondent still relied upon the early break for the discipline and Bush did not raise
45 the issue of unexplained gap times of March 11 until the grievance meeting, which constitutes a
shifting defense. The Board has long held that a shifting defense is persuasive evidence of
pretext. See, e.g.: *Rainbow Medical Transportation, LLC*, 365 NLRB No. 80, slip op. at 15
(2017); *Airport 2000 Concessions, LLC*, 346 NLRB 958, 978 (2006); *Kudzu Productions, Inc.*,
295 NLRB 82, 90 (1989). Respondent cannot rely upon only one prong of the disciplinary
50 action, the claimed delay in working after the break, when it did nothing to remove the discipline
it knew to be incorrect and disparate. I therefore find that Respondent's reliance on a false

reason for the written warning was pretextual. *Tecmec, Inc. d/b/a T.M.I.*, 306 NLRB 499, 504-505 (1992), *enfd.* 992 F.2d 1217 (6th Cir. 1993); *Future Ambulette*, 903 F.2d at 143. Respondent therefore violated Section 8(a)(3) and (1) by giving Evans a written warning for taking his break early and allegedly wasting time.

VIII. AFTER RECEIVING THE WRITTEN WARNING EVANS CONTINUED TO
PROTEST HIS DISCIPLINE AND OTHER WORKPLACE ISSUES

Evans sent Bush a 7-page letter, dated April 12, 2016, with attachments. (R. Exh. 1.) Evans delivered the letter to the office, requesting that the secretary give it to Manager Bush. The letter noted Bush provided the work reports, then stated he had no gaps in his performance. Evans raised that management did not establish “just cause” on the recent disciplinary action and violated Section 8(a)(1) and (3) of the Act. He further noted that Braggs was having problems with targeting associates who he had problems with and those who challenged his authority. Bush never contacted Evans about the letter; he never read it and said he gave the letter to HR Manager Thompson. (Tr. 1032, 1080.) Thompson never discussed the letter with Bush. (Tr. 1080.)

Evans also sent to HR Director Thomas a copy of the April 12 letter and attachments. She read Evans’ letter and believed the letter was about past grievances and complaints regarding grievances. Thomas testified she did not respond to the letter because she thought he should follow the processes described in the collective-bargaining agreement and she was not a step in that process. On cross-examination, Thomas reluctantly agreed that the letter included complaints about Braggs’ treatment of third shift workers and himself, which Evans characterized as a hostile work environment. She also agreed that Evans stated he was being retaliated against in a way that might violate Section 8(a)(1) and (3). Evans requested an investigation into such conduct. Evans later asked that his discipline be rescinded and removed from files. Thomas did not attempt to find out whether a grievance was filed nor did she speak to Youngdale or Bush about it. She also did not contact Human Resources in Byhalia because the HR person was likely on leave and Thomas herself would have been in charge of the Byhalia facility Human Resources functions. She did not forward the letter to anyone in Byhalia and instead filed the letter until 2 weeks before this hearing, when she forwarded the letter to Byhalia HR Manager Otto.

IX. MAY 2016: EVANS RECEIVES A 30-DAY SUSPENSION FOR ALLEGED VIOLATION OF SAFETY
RULES AND SUBSEQUENTLY IS TERMINATED FOR ALLEGED THREATS

A. Events Leading to May 2016 Disciplinary Actions

On April 21, 2016, while working inbound, Evans dropped windshields from his pallet. The crates were double-stacked and the top crate fell off. Evans reported the incident to Supervisor Ayikwei. Evans again asked Simpson to represent him in this matter before Respondent issued discipline. Simpson, who did not witness the event, conducted his own investigation. Simpson found that Respondent did not conduct a proper investigation because the investigative report on the incident was not present. Simpson concluded the incident was a “freak accident”; sometimes manufacturers do not strap down the product properly or sometimes employees do not store properly. It would be impossible to inspect pallets or skids because pallets could be in the air. Ayikwei told Simpson that he did not believe Evans should receive severe discipline. (Tr. 99.)

Supervisor Ayikwei did not document whether Evans improperly lifted the crates. (Tr. 1075.) Ayikwei prepared documentation and recommended a 5-day suspension based upon previous steps of discipline. (GC Exh. 65.) Respondent considered what level of discipline Evans required for a safety rule violation (Rule 5). On April 26, 2016, Byhalia HR Manager Leslie Thompson emailed Youngdale, Bush, Ayikwei, and Thomas about what level of discipline to give Evans:

Because of his other steps of discipline the next step would be a suspension. . . .

Continued behaviors are posting a lot of disruption on 3rd but I still want to ensure that we have all the documentation needed before he is suspended.

I advised the supervisor that I would like to run these through you once we get to the point of suspension and beyond. Arnold Ayikwei is the supervisor. I am copying [Thomas] so she is aware of the multiple incidents involving [Evans].

(GC Exh. 66.)

Youngdale responded the same day:

The 4th step of progressive discipline is a 30-day suspension. Where is the 5-day suspension coming from? We need to be consistent with what is published in the written work rules.

Aside, since you have the documentation of his accident, then by all means write him up and suspend him for the 30 days.

The key to this discipline, as with all other disciplines, is consistency i.e. I assume we have been writing up other employees for similar incidents? This will be especially important with [Evans], because as you know he has claimed that he is being targeted and retaliated against. So, we do not want to end up in a situation where [Evans] or the union is able to show that we ignored similar incidents with other employees but discipline [Evans] for the same thing.

(GC Exh. 66.)¹⁹

Despite Youngdale's reminder on consistency in writing up other employees, Bush, who had been on vacation during the incident itself, did not check with Thompson to determine whether Respondent had disciplinary consistency. (Tr. 1079.) At some point, Youngdale advised Bush that Ayikwei had not performed a proper accident investigation. (Tr. 1117.)

B. After Receiving Discipline, Evans Makes Angry Statements, for which He is Terminated

On May 3, Evans and Simpson met with Manager Bush and Supervisor Ayikwei in an office in the front of the facility. The door was closed. Bush credibly testified that the delay in giving the discipline to Evans was because he was on vacation when the incident occurred.

¹⁹ Bush testified that 5-day suspensions could be used only for attendance. (Tr. 1068.)

Bush explained that after this last incident and the previous steps of discipline, he had to give Evans a 30-day suspension. (Tr. 48-49; GC Exh. 18.) Bush gave Evans and Simpson a copy of the discipline. Simpson asked to speak on Evans' behalf. Bush said his decision was final and he did not need to hear what Simpson has to say.²⁰ Simpson said the meeting was very short, somewhere between 2 and 5 minutes.

According to Bush, Bush opened the door and Evans said to Bush, "You have no fucking integrity." (Tr. 1025.) As they exited the room, Bush testified that Evans repeated that he had no "fucking integrity." (Tr. 1025.)

A contract security guard and security supervisor, Candid Patino, was waiting outside the door and followed them. Bush testified that the standard practice was to have the security supervisor on duty outside for an escort for suspensions and discharges. (Tr. 1021-1022.) Evans and Simpson walked out of the room, with Evans ahead of Simpson into a hallway, past some open cubicles. As they left the conference room, Evans testified that he asked Bush if Bush intended to respond to his April 12 letter; Bush said if he had time, he would, but if he did not have time, he would not. (Tr. 611.)

Bush and Ayikwei were behind Patino; Bush was approximately 8 to 10 feet from Evans. (Tr. 54, 561, 1090) Patino walked Evans, with Simpson, along a hallway with cubicles. Per Bush, along approximately 50 feet of hallway were two offices and two cubicles. (Tr. 1027.) Simpson noted Evans was as upset as someone who just incurred a 30-day suspension, but Evans was not in "a rage." Simpson denied that he heard Evans say to Bush, "I'm going to get your ass" or "I will see you in 30 days and we will handle it then."

Bush testified that, as they walked through the hallway in about 1-minute maximum time, Evans loudly said he would be back, this isn't over, and I'll see you in court. Evans made no effort to come towards Bush. (Tr. 1089.) Simpson tried to drag Evans to keep going as people in the office started watching what was happening. Bush could not understand everything Evans said because Patino was in front of him and Simpson kept saying to Evans, "Come on, man, come on man." (Tr. 1091.)²¹ However, Bush testified that Evans' demeanor and attitude made him feel threatened. (Tr. 1089.) Bush left the processional until it reached a corner. Bush stayed in the HR office until the escort was completed. Bush denied hearing the additional threats because he was too far away from Evans when the statements were made.

Evans testified he said to Bush that the company would not make it with people like him in leadership; Bush had no integrity and if you think this is over, you will see me and my lawyer. Simpson could not recall specifically what Evans said and "it could have been more words but that was the main points that he made when he was making his statements." (Tr. 54.)

Patino positioned herself at the exiting door and Simpson walked Evans to his car. Simpson asked Evans if he wanted to file a grievance, which Evans did.

Bush requested Patino write a statement. He denied telling Patino what to write. Patino testified her normal practice was to document each incident. Patino wrote the same day as the incident:

²⁰ Bush needed to attend another meeting immediately after meeting with Evans and Simpson.

²¹ Although Bush's statement does not reflect Simpson saying, "come on man", Simpson testified he was trying to get Evans out of the building.

I am writing this statement on the suspension on today of Walter Evans. I witnessed Kevin Bush having a meeting with Walter Evans explaining to him his suspension. Upon dismissal Walter Evans became very upset. He started cursing and pointing his finger at Mr. Bush. Walter Evans stated that this isn't over, you think you can get away [with] this, no I'm going to get your ass. You think you can do this shit and get away with it. I will see you in court. Better yet I will see you in 30 days and we will handle it then. I'm going to get your ass. He was asked to leave the property. He continue[d] to say these thing as he walked out and [that] he wanted to file a grievance now. He was very upset and in a rage. He left the property and stated this is over again while leaving.

On May 4, Bush emailed HR Director Thomas, Labor Relations Manager Youngdale and Director Oncur a statement about the incident with Evans as he left the facility:

. . . Mr. Evans was issued a Rule Of Conduct #5 for working unsafe yesterday. This step of discipline caused him to receive a 30 Day Suspension. After ending the meeting all parties stepped out of the Main Office Conference Room and while security was escorting Mr. Evans he told me "I had no fucking integrity", stated "this was not over and that he would see me in court" and continued this type of behavior while being escorted from the building in the presence of his union representation. Statement from security has been given to Local HR, also the supervisor involved with the discipline will also provide a statement. This was an interruption to work in the main office as other employees in their cubicles stood up to see and hear Mr. Evans. . . . [S]ince using profanity and threatening managers is a Rule Of Conduct violation, are we ok to prepare termination paperwork before this employee returns to work on June 6th, 2016.

(GC Exh. 48.)

Thomas testified that Respondent only had 2 statements—from Patino and Bush. On May 11, 2016, Respondent determined to terminate Evans based upon his alleged violation of Rule 20.²² This rule prohibits threatening, harassing, intimidated, interfering, or coercing an employee and includes brandishing any instrument with intent of causing body harm. Byhalia HR Manager Leslie Thompson discussed the matter with Thomas. Thomas could not recall whether she saw written statements before or after she agreed to terminate Evans nor how many written statements were present.

Respondent sent a letter to Evans, dated May 11, 2016, that he was terminated effective May 3 based upon violations of Rules 9 and 20. The Union began the grievance process on Evans's termination on May 12.

About mid-June 2016, post-termination, Evans filed complaints with the Occupational Safety and Health Administration (OSHA) about certain warehouse practices. These practices included storing heavy items on shelves, forklift drivers using cell phones and forklifts blocking traffic in aisles. (GC Exh. 24.) OSHA found no violations. Evans also filed a whistleblower complaint regarding his discharge, the result of which Evans was not sure. No manager or

²² The Disciplinary Action Report, initially dated May 3, 2016, states Evans violated Rules 9 and 20. Bush signed the report on May 10, 2016, the day before the official determination to termination Evans. (GC Exh. 20.)

supervisor discussed Evans' OSHA complaints. Similarly, Evans testified no manager or supervisor ever raised his unfair labor practice charges.

C. *Disparate Treatment Evidence*

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1. dropping parts from vehicles

Before this incident, Respondent had not disciplined anyone for dropping parts. Bush could not recall "off the top of [his] head" anyone receiving discipline for dropping items before Evans. (Tr. 1075-1076.) Simpson testified that, in 8 years with Respondent, he had dropped items but never received even a reprimand or written warning in his file. (Tr. 52, 62.) He stated supervisors must have seen him and supervisors had to come where he dropped the items. When a worker drops an item, the supervisor is supposed to complete a report to submit to management. Simpson had not had grievances before on any reprimands or other disciplines before Evans, but after Evans, more people received discipline for dropping items. (Tr. 64.)

Simelton reported a recent incident where a worker driving a forklift placed a transmission on top of a lighter part and the transmission flipped off the forklift. Simelton did not witness the event and questioned the employee. He also called the supervisor and notified operations to clean up the area. The worker remained employed two weeks after the incident. Simelton did not know whether the employee received discipline. (Tr. 820-822.)

Specific to dropping an item, however, Respondent did not discipline an industrial worker before Evans did so. (GC Exh. 39.)

25

2. cursing and threats

Employee/union steward Andrew Gray testified he was terminated for allegedly making threatening comments to a supervisor. He grieved the termination, which settled for a 30-day suspension, reinstatement and a last chance agreement. Gray's events occurred after Evans' termination.

General Counsel points out that Evans was the first person in the facility to be terminated for such an offense. However, no one testified that any supervisor or manager heard employees cursing or verbalizing threats, much less failed to discipline for it. Bush testified that he did not hear such language in the Byhalia facility.

X. RESPONDENT AND UNION RESOLVE EVANS' SUSPENSION AND TERMINATION THROUGH A GRIEVANCE SETTLEMENT

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On June 30, 2016, HR Director Thomas participated in a third-step grievance meeting regarding Evans' suspension and termination in Byhalia. In preparation for the meeting, Thomas reviewed Patino's statement but could not recall reviewing others. Also present were HR Generalist Cynthia Hayes and Manager Bush. Present for the Union were UAW Business Representative Davenport and Rod Simpson. Hayes took notes for the meeting. (GC Exh. 36.) Thomas estimated that the meeting lasted an hour.

Davenport raised that eight or nine more people had dropped items but only Evans received discipline. Davenport stated the information was requested and, since Respondent had not provided the information, the Union would continue to request it. (GC Exh. 36, p. 2.) Davenport later said that Respondent was picking and choosing who would receive discipline.

50

The Union raised the break room incident as an example of treating Evans differently than others. Davenport talked about the lack of investigation into the break room incident and explained how the lack of proper investigation into the metrics was troublesome. Davenport and Bush discussed the matter for approximately 15 minutes. Returning to the alleged Rule 20 violation, Davenport and Simpson stated they interviewed a consultant who was in the area at the time and that consultant heard no disturbance.

Also at issue during the meeting was Evans' alleged attempt to access the facility after he was notified by letter of his pending termination. Bush called the police. The officer suggested that he file a restraining order but Bush did not. Bush did not file a police report either.²³

Simpson raised that Respondent had no investigative reports on the matter and did not have the proper documentation to discipline him. According to Simpson, Bush got mad and stormed out. (Tr. 95.) The Union contended that Evans' statements were not as serious as Respondent claimed. (Tr. 262.) Thomas contended the witness statements confirmed what they believed occurred. The meeting ended without resolution.

Thomas later discussed the situation with Labor Relations Director Youngdale, who proposed they reinstate Evans back to the step 4 of discipline (30-day suspension) and put aside the discipline for the accident because the information did not show the accident was serious or intentional. (Tr. 263.) On July 8, 2016, the Union was presented with this proposal, which it accepted. The terms specifically stated:

In resolution of both grievances . . . , the Company offers to rescind the Work Rule #5 violation administered to [Evans] on 5/3/16 and reduce the penalty for the Work Rule #9 and #20 violations to a thirty calendar day suspension as the fourth step in the progressive discipline process. [Evans] official date of reinstatement would be 6/3/16, and he will be provided backpay from that date until he physically returns to work.

This grievance settlement is offered without prejudice to the issues involved and without setting precedent.

Evans received backpay, less the 30-day suspension and was given an effective reinstatement date of June 3, 2016.

On July 22, although the grievances were settled, Thomas called the contractor mentioned by the Union in the third step meeting to verify the Union's investigation. The contractor verified that Evans was upset and stated, "You think you can do this shit and get away with this. I will see you in court," and "I will see you in 30 days and we will handle it then." The contractor further confirmed Evans said "you have no integrity" without any cursing. He did not confirm that Evans was in a rage; instead the conversation confirmed that Evans cooperated with security and asked for Simpson to file a grievance. (GC Exh. 50.) Thomas forwarded this information to Youngdale.

Thomas testified the contractor was not present for the entire chain of events in the hallway; she said the statement was incomplete and did not contradict Patino's statement. (Tr.

²³ Evans testified that, on May 18, 2016, he went to an area near the warehouse to meet with Simpson and obtain a copy of the Disciplinary Action Report, which Respondent did not provide with the termination letter. (Tr. 347.) He denied attempting to conceal his identity. (Tr. 348.)

296.) Thomas testified that the only reason to contact the contractor was to determine whether Patino's statement was influenced. (Tr. 299.) Thomas also called Patino, who denied she was influenced in writing her statement. (Tr. 301; Jt. Exh. 3.)

On Thursday, July 27, 2016, Union International Representative Davenport telephoned Evans with the news the grievance was settled. The Union did not contact Evans about the possible terms of settlement until the matter was complete. Davenport told Evans that the Rule 5 discipline (for safety and tipping the crate) was removed, but the other discipline, for the threats and obscenities, remained on his record. HR Generalist Hayes also called Evans to tell him to report to work on the following Monday at 7:00 a.m. When he returned to work, Evans worked in outbound because he previously bid on a job there.

XI. DISCUSSION AND ANALYSIS OF MAY 2016 SUSPENSION AND TERMINATION AND POSSIBLE DEFERRAL TO GRIEVANCE SETTLEMENT

A. *Credibility*

Bush's email statement corroborates Evans, which said he would see him in court. Bush alone testified Evans said he had no "fucking integrity." Bush's statement does not corroborate the accusations that Evans said "I'm going to get your ass" or "I'll be back in 30 days in we'll handle it then." (GC Exh. 48.) Evans denied making such a statement. Bush admitted that he was too far away to hear Evans' entire diatribe. Bush denied that he ever heard employees in the Byhalia facility use profanity. Interestingly, General Counsel's witnesses did not testify that employees used a modicum of profanity in the workplace. I therefore credit Bush that he had not heard shop language.

Simpson's testimony was too vague to rule out that Evans used the f-bomb towards Bush or tell Bush he would get his ass. He was trying to hurry Evans out of the building. He also did not present his own written statement for his investigation into what happened. I credit his statement that Bush stormed out of the grievance meeting, having been confronted about the validity of the discipline causing the suspension.

Patino, the contract security guard, stated she had difficulties recalling the events due to her medical condition. She was brutally honest about what she could not recall. She recognized Evans, but could not recall the actual event. (Tr. 985-987.) She did not have any independent recollections and stated she would have written the statement for an incident report as her usual practice. She did not recall whether anyone asked her to write it. Because of her memory issues, she would not have been able to explain what the phrase "in a rage" meant when she wrote it. Rage, as a noun, can mean violent anger or an intense feeling, without necessarily indicating volume. See www.merriam-webster.com/dictionary/rage.

Patino disputed the statement that she was not in the meeting and never attended any disciplinary meetings; instead her practice was to stay in the hallway and wait to provide the escort, which I credit and is consistent with other testimonies. She also had no recollection of talking with Thomas about the alleged coercion in her statement. I partially credit her written statement as witnesses establish she was closest to Evans, putting her in the best position to hear what Evans was saying. Some of her statement was corroborated by the contractor working in that area. As a security guard, Patino had little incentive to create facts that could make more work for her.

Evans' statements about integrity occurred as he exited the meeting. In hearing, Evans became angry and verbally hostile with a slight increase in volume and I infer he exhibited the same sort of conduct in this situation. As demonstrated in hearing, Evans has difficulty allowing others to have the last word. Based upon Simpson's investigations and Bush's testimony, it is clear that Evans was loud enough to cause at least one contractor to come out of offices or rise from his cubicle to see what was happening. Based upon Thomas's discussion with the contractor, he heard at least part of Evans' statements, but perhaps not all.

Bush and Thomas admitted they received Evans' April 12 letter. Both claim they spent no time looking at it and either threw it in a file or passed it along. Evans (?) testified that Bush would read the letter if he had a chance, which obtusely corroborates Bush's claims that he spent no time looking at the letter. I also credit that Thomas threw the letter into a file. I therefore determine Respondent received Evans' April 12 letter, failed to read it and more likely chalked it up to Evans' usual complaints, of which Respondent's human resources staff were acutely aware per emails.

I give some weight to Thomas' conversation with the contractor despite the hearsay nature. What Thomas reported was against the interest of Respondent. Administrative agencies are not required to follow the technical rule of exclusion and are permitted to give weight to hearsay "if rationally probative in force and if corroborated by something more than the slightest amount of other evidence." *West Texas Hotels, Inc.*, 324 NLRB 1141 fn. 1 (1997), citing *Alvin J. Bart & Co.*, 236 NLRB 242 (1978) and quoting *RJR Communications*, 248 NLRB 920, 921 (1980).

B. Parties' Positions

General Counsel contends that the suspension was unlawful due to several factors. For the termination, General Counsel analyzes the situation as protected activity and whether Evans lost the protection of the Act under *Atlantic Steel Co.*, 245 NLRB 814 (1979). General Counsel also contends that a *Wright Line* analysis demonstrates the termination was motivated by animus because no other employees were discharged for using "harsh language" to a supervisor or manager during or after a disciplinary meeting. (GC Br. at 39, citing GC Exh. 42.)

Regarding the suspension, Respondent admits Ayikwei's investigation did not "adequately document any unsafe or negligent conduct by Evans." (R. Br. at 35.) This fact made Respondent willing to rescind this discipline and make Evans whole in the grievance settlement for that portion of the disciplinary action. Regarding the termination, Respondent contends Patino's statement is the most accurate of what Evans stated as she was the closest to Evans. Respondent's position is that General Counsel did not prove a prima facie case regarding the termination and, even so, the grievance settlement should be controlling.

C. Discussion

1. Suspension for tipping crates

General Counsel presents a strong prima facie case. I do not rely upon Evans' April 12 letter to show knowledge and animus. Youngdale acknowledged Evans' claim he was targeted for his activities. Knowledge and animus are shown in Thompson's email in which she states Evans was still "disruptive" on the third shift. Given similar conduct at the hearing, Evans undoubtedly did not stop talking about his concerns under the collective-bargaining agreement after the discipline for the claimed early break, whether in meetings or on the warehouse floor.

Evans' history reflects that the "disruptions" sometimes were related to collective-bargaining issues and employee rights. No one receiving Thompson's email denied Evans continued his "disruptive" behavior, which is her euphemism for his activities. This euphemism has a connotation for disliked union activities or "a code word for unhappiness with the employees' propensity to talk to other people and to stir other employees and to, essentially, try to get them interested in discussing the working conditions" *Giant Prideco, L.P. d/b/a Tubular Corp. of America*, 337 NLRB 99, 105 (2001). See also: *Boddy Construction Co.*, 338 NLRB 1083 (2003) ("disruptive" influence as code for union support and activities); *United States Steel Corp.*, 279 NLRB 16 fn. 1 (1985).

Respondent seized upon the incident to send Evans further down the progressive disciplinary path. It relied upon a prior unlawful disciplinary action, which it knew to be incorrect. Relying upon a prior unlawful discipline taints the subsequent disciplinary action. *Relco Locomotives, Inc.*, 358 NLRB 298, 311-312 (2012), rev. denied, enf. granted 734 F.3d 764 (8th Cir. 2013).²⁴ Respondent admits that it withdrew the discipline in the grievance settlement due to Ayikwei's insufficient investigation. The discipline was inconsistent with Respondent's past practice in which it did not discipline for tipping or dropping crates; this failure also raises an inference of discriminatory motive. *Giant Prideco*, 337 NLRB at 99. General Counsel has developed a strong prima facie case.

Worse, apparently no one in Byhalia heeded Youngdale's sage advice to ensure Respondent gave discipline consistently for this offense. I find that Respondent's 30-day suspension for tipping over crates was pretextual, particularly because Respondent treated Evans disparately and gave disciplinary action when its investigation was obviously insufficient. Respondent violated Section 8(a)(3) and (1) by issuing the 30-day suspension.

2. Termination for alleged threats in the hallway

Respondent contends that it was within its rights to terminate Evans and the grievance settlement reduced the violation to a 30-day suspension. Respondent argues for deferral to the grievance settlement. General Counsel contends that Evans did not lose the protection of the Act during his promenade down the hall after the disciplinary meeting. I analyze this section under *Atlantic Steel*, supra, to determine whether Evans lost the protection of the Act. I find that Evans made the documented threats, noted by Patino, and that Evans told Bush he had "no fucking integrity" exiting the conference room. The statements were made after the disciplinary meeting concluded.

The *Atlantic Steel* analysis is applied to determine whether "an employee engaged in concerted protected activity can, by opprobrious conduct lose the protection of the Act." *Id.* at 816. Employees are given some leeway in their protected activities as labor relations may trigger heated and angry disputes. *Inova Health System v. NLRB*, 795 F.3d 68 (D.C. Cir. 2015), enf. 360 NLRB 1223 (2014); *Consumer Power Co.*, 282 NLRB 130, 132 (1986). At the same time, employee rights are balanced with the employer's interest in maintaining order in its workplace. *Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 NLRB 308, 311, (2014); See *Plaza Auto Center, Inc.*, 355 NLRB 493, 494 (2010), enf. in part 664 F.3d 286 (9th Cir. 2011), decision on remand 360 NLRB 972 (2014). To ascertain whether an employee lost

²⁴ The Board decision in *Relco*, supra, was decided by a Board panel that included two persons whose appointment to the Board were held invalid. See *NLRB v. NLRB Canning*, 134 S.Ct. 2550 (2014). The Eighth Circuit enforced the Board's Order before *Noel Canning* and there is no question regarding the validity of the court's judgment.

protection of the Act, four factors, which must be “carefully balance[d],” are examined: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice. *Atlantic Steel*, 245 at 816.

For the first factor, the place of the discussion was in the hallway, exiting the conference room. General Counsel contends, and I agree, that this factor favors Evans as it did not occur on the warehouse floor and did not disrupt Respondent’s production. I find the only employee hearing the matter was Simpson, who was present as the union steward. This factor favors protection. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143, slip op. at 36 (2016).

The second factor is the subject matter of the discussion. The meeting itself was about the disciplinary action. Simpson and Evans had no opportunity to explain or discuss it. Evans obviously was displeased and angered. However, the meeting was over when Evans started into his statements. While a discussion of the discipline would have been protected, Evans shifted the discussion to accusations about integrity and what he planned to do about it. Although the matter concluded with Evans telling Simpson to file a grievance and leaving the building, this factor tips towards loss of protection.

For the nature of the outburst, I consider three points: One is whether Evans created a loud disturbance; another is the statement to Bush about “no fucking integrity”; and third, Evans’ threats, contained in Patino’s written statement.

Regarding the volume of Evans’ statements, Thomas, who had heard that Patino’s statement may have been coerced, spoke with the contractor mentioned in the third step grievance meeting after Evans’ termination. The contractor partially confirmed what the Union representatives said: Evans had not caused any disturbance and he heard no threats. Here, I take the contractor’s version with a grain of salt, because the outburst was loud enough for him to hear at least part of what happened.

The statements—the “no fucking integrity” comments to Bush and the alleged threats—are examined for whether the outburst possibility “could undermine an employer’s authority” *NLRB v. Starbucks Corp.*, 679 F.3d 70, 79 (2d Cir. 2012). For obscenities, the Board assesses the level of risk of other employees hearing the obscenities. *Id.* at 79–80 and cases cited therein. For the “no fucking integrity” statements to Bush, save Simpson, the risk of warehouse employees hearing it were low. No evidence shows anyone in the cubicles heard Evans verbalize obscenities. Although certainly disrespectful, Evans did not undermine Bush’s authority to the warehouse employees. See *Winston-Salem Journal*, 341 NLRB 124, 126 (2004), enf. denied sub nom. *Media General Operations, Inc. v. NLRB*, 394 F.3d 207 (4th Cir. 2005) (Board finds obscenities, calling manager racist, and pointing finger at manager insufficient to lose protection). If it had been the only part of the events, it may have been considered a “single verbal outburst of insulting profanity” would not cause loss of protection. *Plaza Auto Center*, 355 NLRB at 495.²⁵ However, Evans treated Bush with disrespect, which tips this factor towards losing protection of the Act. *Felix Industries, Inc. v. NLRB*, 251 F.3d 1051, 1055 (D.C. Cir. 2001) (employee called supervisor “fucking kid” three times); *Stanford New York, LLC d/b/a Stanford Hotel*, 344 NLRB 558, 558–559 (2005) (this factor favored lost protection when employee called general manager “a fucking son of a bitch”).

²⁵ The Ninth Circuit remanded *Plaza Auto Center* for rebalancing of the *Atlantic Steel* factors, because the nature of the employee’s outburst was not protected. On remand, the Board still found that the employee did not lose protection of the Act but accepted that this factor favored loss of protection. 360 NLRB 972.

The other consideration is Evans saying, more than once, that he was going to “get [Manager Bush’s] ass.” This statement is different than the employee who told his boss to get his ass” back in the office. *United States Postal Service*, 251 NLRB 252, 256-257 (1980), enfd. 652 F.2d 409 (5th Cir. 1981). The question arises whether the threats are sufficient to make Evans unfit for service:

[t]he Board draws a line between “cases where employees engaged in concerted actions that exceeded the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the conduct is so violent or of such character to render the employee unfit for further service.” *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011), citing *Prescott Industrial Products Co.*, 205 NLRB 51, 51–52 (1973). In *Kiewit*, the Board found protected remarks that were “intemperate” but simple, brief, and spontaneous reactions, distinguishing them from premeditated, sustained personal threats, or unambiguous or outright threats of personal violence. *Id.* [additional cites omitted]

United States Postal Service, 360 NLRB 677, 683 (2014).

Here, Evans impliedly threatened Bush. Thus, Evans’ conduct was somewhere in between conduct with improper motive and explicit personal threats. Threatening “see you in court” is permissible. Impliedly threatening harm is not. Given the current work environments, with sensitivity towards workplace violence, these statements cannot be taken lightly. The situation is not analogous to *Consumers Power Co.*, 282 NLRB at 137. The employer “blew up” an incident with the alleged discriminatee’s hand brushing against a supervisor’s chest. The incident did not include any additional striking blows, threatening gestures, or other threats. *Id.* Here, harm was impliedly threatened. This factor strongly favors losing protection of the Act.

The fourth factor, whether the outburst was in response to an unfair labor practice, supports finding protection. As previously discussed, Evans had just received a 30-day unpaid suspension, which I found was unlawful. Had Respondent followed Youngdale’s advice about checking for consistency in disciplinary action or not proceeded because of Ayikwei’s insufficient documentation, the disciplinary meeting would never have taken place. No other unfair labor practice occurred with the disciplinary action. This factor favors protection.

In balancing the factors, the location and response to an unfair labor practice favor protection. The subject matter and the nature of the outburst point towards no protection. Given the implied threats, I conclude that Evans lost the protection of the Act. I recommend that this allegation be dismissed.

D. Defer to the Grievance Settlement?

In cases with merit, the Board may defer a grievance settlement as long as it meets the standard set forth in *Alpha Beta Co.*, 273 NLRB 1546 (1985), rev. denied sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987) and *Independent Stave*, 287 NLRB 740, 743 (1987). See *Babcock & Wilcox*, 361 NLRB 1127, 1139 (2014), rev. denied sub nom. *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017). Before applying the 4 *Independent Stave* factors, the settlement is examined to show that: the parties intended to settle the unfair labor practice issue; that they addressed it in the settlement agreement; and that Board law reasonably permits the settlement agreement. *Id.*

As a policy, non-Board settlements that do not provide a full remedy is part of the Board's policy to encourage "nonlitigious resolution of disputes." *Id.* at 741. The Board recently reaffirmed these principles in *UPMC*, 365 NLRB No. 153 (2017) (reversing *United States Postal Service*, 364 NLRB No. 116 (2016)). The remedy does not have to be identical to a full Board remedy, as that requires the parties incur the litigation risks and costs. *Id.* at 742-743. *Independent Stave*, 287 NLRB at 743, explains further:

Each of the parties to a non-Board settlement recognizes that the outcome of the litigation is uncertain and that he may ultimately lose; thus, the party in deciding to settle his claim without litigation compromises in part, voluntarily foregoing the opportunity to have his claim adjudicated on the merits in return for meeting the other party on some acceptable middle ground. The parties decide to accept a compromise rather than risk receiving nothing or being required to provide a greater remedy. When we reject the parties' non-Board settlement simply because it does not mirror a full remedy, we are consequently compelling the parties to take the very risks that they have decided to avoid, as well as depriving them of the opportunity to reach an early restoration of industrial peace, which after all is a fundamental aim of the Act. See *International Harvester Co.*, 138 NLRB 923, 926 (1962).

As noted above, the testimony does not demonstrate that the parties intended to settle the unfair labor practice issue. The unfair labor practice was not addressed in the settlement agreement. The Union did not have the power to settle the unfair labor practice because Evans, as an individual, filed the unfair labor practice charge. In addition, the Union did not confer with Evans until after the settlement was a done deal. These factors alone make deferral inappropriate and the *Independent Stave* analysis is unnecessary. Therefore, deferral to the grievance settlement is not warranted. See *Midwest Television, Inc.*, 343 NLRB 748, 763 (2004) (incomplete monetary settlement and charging party did not sign agreement did not preclude the Region from proceeding); *Alpha Beta*, supra, at 1547-1548.

XII. AFTER REINSTATEMENT, EVANS CONTINUES HIS UNION ACTIVITIES

Evans returned to work on August 1, 2016, in outbound on first shift. His supervisors were Mark Leftwich and Bobby Clark. Evans testified he had no problems with either of those supervisors.

After Evans returned to work, about August 2016 through January 2017, Evans purchased and distributed union t-shirts. (GC Exh. 27; Tr. 505-506.) The shirts had on the front the slogan, "In solidarity there's unity. There's solidarity in strength," and the back with the UAW logo. Evans and other bargaining unit employees distributed to union members during breaks and before and after work. (Tr. 366.) No supervisor or manager ever commented to Evans about the t-shirts or their distribution. (Tr. 506.)

From August 2016 until March 2017, Evans also distributed printed materials to employees during break times or before and after shifts. (See, e.g., GC Exh. 28.) In January 2017, Evans requested the Union file a grievance about overtime and the seniority list. After Respondent investigated the grievance, a number of employees, including Evans, received compensation. (Tr. 370-371.) From the time of his reinstatement in August 2016 until his termination on March 17, 2017, Evans testified that he could not recall any management actions

that could be characterized as hostile or retaliatory. (Tr. 565.) No evidence shows Respondent was aware of any of these union activities.

XIII. RESPONDENT NOTIFIES EMPLOYEES IT WILL ENFORCE BREAK BUZZER TIMES

5

A. Orcun Meets with Employees

10 In March 2017, Evans was still working in the outbound area on the first shift. The outbound department was divided into four operating units and each usually held its own pre-shift meeting.

15 In 2017, Respondent shortened the preparatory buzzer time from 5 minutes to 3 minutes. The buzzer had been in place at 5 minutes since 2015. The change came after managers complained that industrial workers lined up to take break or waited in the breakroom even before the 5-minute buzzer rang. (Tr. 1047.) This change was announced at a meeting with all outbound employees on March 16, 2017.²⁶

20 Typically, Mark Leftwich or Bobby Clark conducted the outbound pre-shift meeting. That day, however, Onur Orcun, Kevin Bush and Bobby Clark attended the meeting. The meeting lasted approximately 15 to 20 minutes. Orcun had not attended a pre-shift meeting before this time. Early in the meeting, Orcun²⁷ announced that Respondent was implementing a different procedure for employees taking breaks. The buzzer to announce lunch times already rang at 10 minutes before break. During that time, employees would be allowed to prepare for breaks by walking to the break room, or parking and charging their vehicles. Orcun announced that the
25 buzzer instead would ring at 5 minutes before break time and employees would have to line up at the warehouse door until official break time before entering the break room.²⁸ Per Bush, no employees would be allowed in the break room until the second buzzer. Bush also talked about implementing the new system. He told employees that failure to follow the system would result in disciplinary action under the Code of Conduct, Rule 5, Wasting Company Time.

30

Several employees asked questions. Oncur explained that half the warehouse employees wasting 2 to 3 minutes per day added up to a significant amount of wasted production time. When asked whether the rule would be enforced equally or up to management, Oncur said that management would have discretion over who received discipline. After
35 approximately 15 minutes, Evans asked Orcun if the new system was a change in terms and conditions of employment. When Orcun asked for an explanation of the question, Evans stated, "[U]nder the collective bargaining agreement isn't this a material item that needs to be bargained for, and that a request to bargain needs to be filed or should be filed in regard to this change of past practices and policies." (Tr. 378.) Orcun testified that he recalled Evans raising the terms and conditions of employment. (GC Exh. 63 at 2.) Another employee then asked why this change was happening, especially with the overcrowded conditions in the bathrooms. Others commented that the break rooms did not have enough microwaves.²⁹ Bush said the change

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²⁶ Orcun, whose affidavit served as his testimony, could not recall when the meeting took place. Bush could not recall specifically when the time was changed and thought it may have occurred in 2017. (Tr. 1046.) This would have been the inbound meeting as Bush denied conducting the outbound meeting. (Tr. 1101.) Because Bush was unclear on the dates, I do not credit that he was conducting the outbound meeting.

²⁷ Gray testified that Bush announced the new buzzer system. (Tr. 435.)

²⁸ Evans testified that Bush already implemented this system in inbound. (Tr. 376.)

²⁹ Although Evans testified that Gray asked about changes in past practices and whether management could make such changes, Gray denied making any statements. (Tr. 437.)

was within management discretion. Evans then said, “Who told you that? Who told you that?” (Tr. 380.) Bush did not answer Evans but argued with another employee.

5 When the employees were dismissed from the meeting, Evans went into the warehouse, carrying his equipment. Before Evans reached his equipment, Oncur and Bush walked up to him. Bush said Evans should not be carrying his equipment but have it on.

B. Discussion

10 The complaint specifically alleges Respondent unilaterally changed the enforcement time in which employees could prepare for breaks.

1. Parties’ positions

15 General Counsel contends that Respondent did not enforce rules regarding the buzzer system before March 16, 2017, and multiple employees so testified. Four employees were disciplined after Respondent made the change. According to General Counsel:

20 The Board has held that a change to more strict enforcement of pre-existing rules constitutes a change in employees’ terms and conditions of employment over which an employer has an obligation to bargain. *Hyatt Regency Memphis*, 296 NLRB 259, 263-4 (1989); see also *Vanguard Fire & Supply Co., Inc.*, 345 NLRB 1016, 1017 (2005). Here, the evidence in this case clearly establishes that Respondent unilaterally shifted from a prolonged phase of non-enforcement of the buzzer system rules to a phase of strict enforcement that was
25 ushered in on March 16 without providing the Union with the legally requisite notice and an opportunity to bargain.

30 Respondent maintains General Counsel did not carry its burden of proof. Respondent points out the record has little evidence that Respondent issued more discipline to employees for abuse of the buzzer system. The complaint does not challenge the rule itself. The Union did not file a grievance over the rule, nor did it file the underlying charge over this matter. (R. Br at 41-42.)

35 2. Analysis

40 General Counsel is correct that Respondent cannot more stringently enforce the rules without notifying and bargaining with the Union. In *Hyatt Regency Memphis*, 296 NLRB at 263-264,³⁰ the employer enforced the sign-in/sign-out sheet violations erratically, if at all, before an election. After the election in which employees selected union representation, the employer suddenly enforced the rule. The evidence there showed in the 7 months before the election, no employee had been disciplined at all for violations despite supervisors “tolerat[ing] and condon[ing]” employee violations. *Id.* at 264.

45 As noted, Respondent operates buzzers to notify staff of preparing for any break time, including lunches, and the actual start of break time. Respondent also operates buzzers to notify employees when the break period is about to end and again at the actual end of break period. Orcun told the employees that the amount of time to prepare would change from 5

³⁰ The Sixth Circuit affirmed the Board decision in 939 F.2d 361, 373 (6th Cir. 1991) and granted enforcement in 944 F.2d 904 (6th Cir. 1991) (unpub.).

minutes to 3 minutes. Orcun expressed concern that the employees were losing too much time to break preparation. The evidence as early as 2016, with Evans' discipline and others receiving counselings and warnings, shows Respondent enforced its rules, albeit inconsistently. The enforcement could have been in the form of counseling (being in the break room before the buzzers) to progressive discipline.

The disciplinary actions relied upon by General Counsel is unlike the evidence in *Hyatt Regency*, supra, in that it does not draw a consistent comparison pre- and post-announcement. To threaten discipline is one thing; to execute the threat is another. Four disciplinary actions between March 2017 and August 2018 does not demonstrate Respondent more stringently enforced the rule. The record on Evans demonstrates that Respondent gave counseling and other discipline for early entrance into the break room, violating the buzzer system even before the length of time was shortened. I therefore recommend that this complaint allegation be dismissed.

XIV. ON MARCH 20, 2017, RESPONDENT TERMINATES EVANS AFTER HE BACKS OUT OF AN AISLE ON MARCH 17, 2017

Safety rules for operating equipment in the warehouse include not backing into or out of aisles. (Tr. 82; GC Exh. 58 at 1.) These rules have been in place since 2015.

The day after the outbound meeting about the break buzzer, Friday, March 17, 2017, at about 8:30 a.m., Evans admittedly backed out of an aisle while working on an order picker. The three main aisles allow traffic, both mechanical and foot, in two directions. A number of the aisles, used for picking, can be traversed only in one direction and bisect the main aisles. The aisles for picking have racks where the merchandise is stored. Some of the aisles have cross tunnels to cut across the racks without going into the main aisles. Near the area where Evans backed up was a managers' desk, where the managers and supervisors were conducting a meeting.

A. Events Leading to Evans' March 2017 Termination

Evans testified that he needed to pick an item in aisle 127. Aisles 126 and 128 travel in the same direction and allowed entry from the main aisle B; aisle 127 travels in the opposite direction. Aisle 129 allows two-way traffic. Evans pulled into aisle 126 from main aisle B. He testified that he backed out of aisle 126 because the aisle was blocked by a safety cone and other pieces of equipment in the aisle, including another order picker and a reach truck. Evans sat in the aisle for approximately 1 minute, observing that the reach truck operator flipped his emballage upside down and the emballage's sides came apart. Evans did not want to block the aisle and was further concerned about the safety cone. Evans could not reach the cross tunnel to cut through to another aisle. He backed the order picker into main aisle B for about 20 feet to straighten out and prepared to go forward. The order picker had no mirrors and Evans had to look around to back up. As he backed up, Evans testified that he blew his horn.

At about 8:30 a.m., the management team in the outbound area began its daily operational meeting in the main aisle, approximately 80 feet from aisles 126-128. Manager Bush, Supervisor Bobby Clark, Operational Support/Safety Supervisor Burt Barton, inbound team lead Deadrick Simelton, Quality Supervisor Randy Sheeley were present in the meeting.³¹

³¹ Clark testified to leading questions regarding others at the meeting. He credibly raised that the personnel changes made it difficult to recall each person at the meeting. (Tr. 696-697.) Sheeley and

During the meeting, Bush pointed out that someone on a truck was backing out into the aisle and pointed at the person backing out. (Tr. 1035.) Bush could not see who was on the vehicle. Bush said the person started to back up again. Clark, who had his back to the aisle in question, immediately turned around and saw the person backing out of the aisle into the main aisle.
 5 Barton, in charge of safety, started to move towards the truck. Clark also went to the truck. Clark testified that Evans was backing out of aisle 128.

According to Evans, Supervisor Clark walked up to him as he prepared to drive forward. Evans testified that Clark asked to speak with him but went to speak with two other drivers first.
 10 Evans testified that he drove toward a cross aisle into aisle 127 and obtained his item. (Tr. 413-414; GC Exh. 29, DLX log.) When Clark and Evans were able to converse, Clark told him he should not be backing out of the aisle.

Clark testified that he reached Evans while Evans was still backing up. He told Evans
 15 that he incurred a safety violation, which Bush had pointed out, and that they would need to talk about it later. Clark further testified that Evans admitted he knew it was a safety infraction but he had to get out of the aisle. Clark told him the issue would be addressed later in the day but would allow him to complete the back out. The main aisle was clear, and Clark allowed him to continue because Evans was already at least half-way into the aisle. (Tr. 699, 715.) By that
 20 time, Barton was at the site, taking cell phone photographs of the incident. Clark and Barton returned to their meeting and discussed the safety violation. (Tr. 700.) Clark could not recall whether Evans had an emballage.

At about 9:30 a.m., Orcun, Otto and the managers met for the management escalation
 25 meeting to review the previous day's production and deal with any issues. Usually, personnel issues were not discussed at these meetings, but safety issues were. Shortly before the meeting, Bush, with Clark present, advised Otto that Evans had a safety issue after the meeting. At about 10 a.m., the three discussed what they observed with Evans. Otto asked Bush to have each witness send him an email and the photographs taken by Barton. Bush sent his statement
 30 and had no further involvement as Evans did not report to him. (Tr. 1038.)

At 10:45 a.m., Simelton sent an email to Otto and Bush stating only that he saw Evans
 35 backing out of a location. He testified he did not know whether Evans sounded his horn, but he was 60 to 70 feet away. He also could not recall specifically whether the main aisle had traffic but at that time of the morning, traffic was usually present in the main aisle.

After hearing from Bush and Clark, Otto notified Labor Relations Manager Youngdale,
 40 HR Director Thomas, and Director Orcun because Evans' unfair labor practice hearing was scheduled for March 27 (10 days later).

At about 10:45 a.m., HR Manager Otto met in his office with Evans and the first shift
 45 union committeeman, Richard Green. (Tr. 408, 913-914.) Otto testified that, before this incident, he would not have recognized Evans. Evans admitted backing out of the aisle because others were in the aisle and to prevent an individual from being trapped in the aisle without egress. Evans said to block would have violated OSHA standards. Evans further said he was careful when he backed out and honked his horn while doing so. Otto asked Evans to write a statement and permitted Evans to write the statement after lunch.

Barton, who were present at the meeting, had since been terminated for various reasons. (Tr. 913.) They did not testify.

Evans' recollection of what Otto specifically said was somewhat fuzzy. He recalled Otto raised that he backed out of an aisle and allowed the two employees during their lunch to return to aisle 126 to document what happened. Evans stated he and Green used their phones to take pictures of the mess in aisle 126, which was still there. These pictures were not available for hearing. After lunch, Evans provided Otto with a handwritten statement. (GC Exh. 30.) At the time he wrote the statement, Evans claimed he could not recall the exact location of the item and later completed it. (Tr. 574, citing Jt. Exh. 2 at 301.)³² Evans provided his DLX log at some point. Evans continued to work in the warehouse for the rest of his shift.

At 11:25 a.m., Clark sent Otto an email to document what he observed. (Tr. 701, 718; Jt. Exh. 3, Company Exh. 16.) The email only stated Clark witnessed Evans backing up and includes no details, such as which aisle or whether Evans sounded his horn. The failure to sound the horn would be another safety violation.

After receiving the emails, Otto conducted further investigation, comparing aisle 128, where the supervisors said Evans was backing out, and aisle 126, where Evans said he backed out. He tried to discover whether a safety cone was present, as Evans said one was in the area. He also reviewed Evans' DLX logs for Evans' picks. (Tr. 951; GC Exh. 29.) The record reflects that Evans had been making a pick in aisle 127 at approximate 8:39 a.m., a few minutes after the managers observed Evans. Otto did not go back to Evans to clarify that the pick records were not consistent with Evans' recollection of which aisle he was in. (Tr. 952-954.)

Otto reviewed Evans' disciplinary logs to determine Evans' stage of discipline. Otto discovered that Evans was a step 4 in his discipline and the next step was step 5, termination. Otto, per his usual practice, drafted a report. He then submitted the report to Youngdale and Thomas on Monday, March 20. (GC Exh. 51.) According to Otto, Bush was not consulted about the decision to terminate Evans. (Tr. 924.) Otto testified that he was unaware that no one received discipline at any level for backing out of an aisle before Evans. (Tr. 968.) Otto credibly testified that the upcoming unfair labor practice hearing played no role in the decision to terminate Evans.

On March 20, 2017, Evans and alternate committee person LeRonne Jones³³ attended a meeting in Otto's office with Otto, outbound Manager Derek Hare and Supervisor Mark Leftwich. Otto read a statement to Evans from a disciplinary action report, identifying that Evans violated work rule 5. Evans was terminated pursuant to Respondent's progressive discipline policy. (GC Exh. 31.) Otto then asked Evans if he had anything to say. Evans did not and refused to sign the disciplinary report. However, as he left the room Evans said, "I hope you got it right this time." (Tr. 928.) The Union grieved this termination, which eventually was arbitrated.

B. Respondent and the Union Arbitrate Evans' Termination Grievance

Evans' termination grievance reached arbitration on October 4, 2017. (Jt. Exhs. 2, 3, 4.) Respondent asked the arbitrator to hear and decide the issues contained in the Section 8(a)(3) and (4) unfair labor practice charges. The Union objected as it was not a party to any of the unfair labor practice charges. The arbitrator asked the parties to discuss the issue in the post-

³² Evans' testimony regarding what he was trying to pick and where shifted from the arbitration, where he gave sworn testimony, to this hearing. Eventually the DLX sheet showed he should have picked the item at aisle 127-157. Otto's hearing testimony confirmed that Evans did not initially recall which aisle from which he backed out.

³³ Otto initially testified that Richard Green was present at the termination meeting instead of LaRonne Jones. (Tr. 964.)

hearing briefs. Despite this ruling, Evans raised the Board charges during his arbitration testimony. The arbitrator warned that things were getting far afield. (Jt. Exh. 2 at 320-321.)

5 The parties were permitted to present witnesses, examine and cross-examine witnesses, and to enter documentary evidence into the record. Both parties were permitted to submit briefs to the arbitrator.

10 The arbitrator denied the grievance and upheld Evans' termination. (Jt. Exh. 4.) The arbitrator cited applicable contractual provisions, including Art. 20 Sec.4, limiting his jurisdiction to issues fully grieved and Art. 19 Sec. 1, in which employees could be discharged only for just cause. The arbitrator found that Evans backed out of aisle 128 instead of aisle 126, which was a violation of Rule 5. He did not rely upon Respondent's allegation that Evans failed to honk the horn as well, as it was unlikely that they heard the horn. Because Evans was at the step of progressive discipline requiring termination, the arbitrator determined Evans was discharged for just cause. (Jt. Exh. 3 at 14.) Regarding Respondent's desire to obtain determination of whether Evans' union activity and Board charges were involved in the termination, the arbitrator sided with the Union and limited his determination to just cause as required by the collective-bargaining agreement. (Jt. Exh. 3 at 15.)

20 *C. Disparate Treatment Evidence*

Respondent gave all levels of discipline for safety, Rule 5 violations. Evans was the only one terminated. Otherwise, the disciplinary actions included over 35 verbal reminders, several written reminders, several written warnings, 2 5-day suspensions, and 1 30-day suspension. 25 The level of prior discipline for these employees was unknown, as was whether they had any union activity.

30 Reported safety violations with disciplinary action occurred in 2015 and 2016. A few examples pre-date Evans' discipline. One was traveling on the wrong side of aisle, failing to come to a complete stop and failing to sound the horn on December 8, 2015. (GC Exh. 39 at 6). The 30-day suspension was for speeding in an area where the posted limit is 9 miles per hour. Another received a verbal reminder for failing to stop at an intersection on August 8, 2016. (GC Exh. 39 at 28.)

35 On March 15, 2017, Dominique Hill received a written reminder for running a stop sign. (GC Exh. 39 at 43-45.)³⁴ After Evans' discipline, three other employees were disciplined for backing out of or into aisles. (GC Exh. 39 at 73; GC Exh. 41.)

40 Bush testified that he would give discipline for backing out if he was substituting for a supervisor and the person reported to him that day; if not, he would report the incident to the offending employee's supervisor and manager. Bush also testified that this was the first time he observed someone backing out of an aisle, although he knew that others had been disciplined for it. (Tr. 1095.) However, he knew of no one at the facility who was so observed before Evans' March 17 incident. (Tr. 1095-1096.) Nor did the evidence reflect anyone disciplined for 45 backing out of an aisle before March 17.

³⁴ Otto initially testified that he did not know who Hill was. Upon examining the relevant pages of discipline, he recognized his report documenting that he observed Hill running a stop sign during the escalation meeting. The service center manager, in the meeting with Otto, recognized and identified Hill. Otto told the manager that Hill needed to be written up for running the stop sign. (Tr. 937-938; GC Exh. 39 at 43-45.)

Simpson backed out of aisles and primarily worked as an order picker when the aisles were blocked. However, he could not recall that a supervisor or team leader ever saw him do so. He also observed other employees doing the same. He stated Respondent is stricter about enforcement nowadays.

Gray also observed people backing in and out of aisles with team leads and supervisors in the area but did not know whether the supervisors observed this conduct. (Tr. 439.) Gray had not filed any grievances about it. Gray recently asked his team leader about backing in or out of an aisle; the supervisor said to just work smart, even if you have to pivot in an aisle. Because I have found team leads are not supervisors or agents, this answer is insufficient.

Dobson, who worked in inbound, also backed his vehicle out of aisle because others were working in the aisle. He received no discipline for doing so. However, he did not testify that supervisors observed him doing so and ignored it. One team leader, Ahmad Rafee, gave written instructions to his team to back out of aisles safely one morning when an aisleway was blocked. Also a certified trainer, Dobson never retrained anyone for backing in or out of an aisle. (Tr. 655.) He testified that Inbound Manager Bush was among the more stringent managers about enforcing the rules.

D. Credibility

Union committeeman, now chairperson, Glenn Dobson is almost completely credited. He demonstrated knowledge of the equipment. When he was not familiar with the dates, he stated such. He testified also that he instructed industrial workers that they were not to back in and out of aisles, yet the practice took place. This position is contrary to General Counsel's interest. However, I do not rely upon his testimony about his recent questioning of the supervisor and backing up: The safety rule is clear about not backing out of aisles. In addition, Dobson asked the question closer in time to the hearing.

Deadrick Simelton, a former union shop steward and now team lead, testified in a straightforward fashion and did not attempt embellishment.

In addition to prior credibility observations, Evans argued much of the time that he was backing out of aisle 126 instead of aisle 128. However, at one point, he said it did not matter which aisle it was. Respondent points out that Evans was questioned why he did not travel in the two-way aisle 129 and cut through a tunnel, or travel in aisle 128 in the same direction; Evans responded: "You have a choice. You have a choice. Either way. I mean, I did it. I mean, I cut down there. So what. So what. I backed out. Yes, I did. Everyone backs out." (R.Br. at 39, citing Tr. 578-584.)

General Counsel suggests that Respondent's failure to produce Barton to testify should draw an adverse inference. Respondent terminated Barton after the arbitration under what Respondent termed "unpleasant circumstances." (Tr. 910.) I decline to take an adverse inference as Barton was no longer under Respondent's control and General Counsel also had a month in which to subpoena Barton. *Advocate South Suburban Hospital v. NLRB*, 468 F.3d 1038, 1049 (7th Cir. 2006), enfg. 346 NLRB No. 23 (2006). Barton's photographs, contained in the arbitration record, demonstrate what the arbitrator relied upon, but neither party relies upon those photographs as substantial evidence for this hearing.³⁵

³⁵ Several witnesses in this hearing also testified before the arbitrator. I do not rely upon any

I credit Otto did not recall recommending discipline to Hill, as it implies Respondent was attempting to enforce its safety rules. However, I do not credit Bush that he did not see employees backing out of aisles before this incident with Evans. The evidence does not support his contention that others were so disciplined before Evans and only demonstrates that employees received discipline for backing out after Evans' termination.

E. Discussion

I find that Respondent, by terminating Evans, violated Section 8(a)(3) but not Section 8(a)(4).

1. Termination and 8(a)(3)

The 8(a)(3) allegation again is analyzed under *Wright Line*, supra, as Respondent contends it has legitimate reasons for its actions. Evans expressed concerns at the meeting the day before he backed out of the aisle, with Orcun and Bush present. Raising concerns about the breaks with other employees at the meeting is concerted activity. *AdvoServ of New Jersey*, 363 NLRB No.143, slip op. at 34 and 35 and cases cited therein. Bush, who witnessed Evans backing out, was present at the meeting the previous day. Orcun recalled that, during the meeting with other employees, Evans raised the collective-bargaining agreement. Bush was familiar with Evans from prior activities, such as the previous unlawful disciplinary actions. Respondent is tasked with the knowledge and animus of its supervisors.

Timing points towards animus as the termination was 4 days after Evans spoke out at the meeting. The termination, claimed to rely upon the progressive disciplinary system, also "stands on the shoulders" of prior unlawful discipline, which had not yet been removed from Evans' record. As to the disciplinary actions for backing out of aisles after Evans' termination, Respondent's actions smack of trying to close the barn door after the cows are let out. These factors also demonstrate animus.

2. Termination and Section 8(a)(4)

Section 8(a)(4) of the Act makes it unlawful for an employer to discriminate against an employee because he has filed charges or given testimony under the Act. 29 U.S.C. §158(a)(4); *Airgas USA, LLC*, 366 NLRB No. 92, slip op. at 6 (2018), enfd. __ Fed.Appx. __ (6th Cir. January 14, 2019). The purpose of Section 8(a)(4) is to "assure an effective administration of the Act by providing immunity to those who initiate or assist the Board in proceedings under the Act." *Briggs Manufacturing Company*, 75 NLRB 569, 571 (1947). In cases where motive is an issue, the Board analyzes Section 8(a)(4) and (1) violations under the *Wright Line* framework. *Shamrock Foods Co.*, 366 NLRB No. 107, slip op. at 10 (2018).

General Counsel establishes a weak prima facie case for a Section 8(a)(4) violation. Knowledge is easily established. Evans filed charges with Board and participated in providing evidence, a fact that could not escape Respondent's purview. Otto was aware of the upcoming

credibility determinations made by the arbitrator and instead rely upon my own observations and likelihood of events. However, some testimony in the arbitration hearing was inconsistent with testimony at hearing and the parties used it for impeachment.

hearing involving Evans. Respondent's managers discussed what to do considering the upcoming hearing, with direction for consistency.

The showing of animus is essentially nonexistent: General Counsel relies upon that Respondent's timing of termination occurred approximately a week before Evans' earlier unfair labor practices cases were scheduled for hearing. Despite Otto's admitted knowledge of the upcoming hearing and managers' notifications, I find no other evidence of animus towards Evans' activities with the Board except the timing, which was a function of when Evans backed out. *S. Freedman*, 362 NLRB No. 82, does not support finding a Section 8(a)(4) violation. The Board found that Respondent's stated reason for terminating the alleged discriminatee for driving on an expired license was false and the administrative law judge credited the alleged discriminatee did not lie about having a current license. *Id.*

I therefore recommend dismissal of the 8(a)(4) allegation. *Sara Lee d/b/a International Baking Co.*, 348 NLRB 1133 (2006).

3. Defer the 8(a)(3) violation to the arbitrator's decision?

The Board has considerable discretion in determining whether to defer to the arbitration process when doing so will serve the fundamental aims of the Act. *Wonder Bread*, 343 NLRB 55 (2004). Also see: *United Technologies Corp.*, 268 NLRB 557 (1984); *Collyer Insulated Wire*, 192 NLRB 837 (1971); *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). The Board's standard for deferring to arbitral awards is also solely a matter for its discretion, as Section 10(a) of the Act expressly provides that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. *Babcock & Wilcox Construction Co.*, 361 NLRB at 1129.

Respondent urges a return to prior long-standing precedent. Pre-*Babcock*, *supra*, the Board deferred to arbitral decisions in cases in which the proceedings appear to have been fair and regular, all parties agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). In *Olin Corp.*, 268 NLRB 573 (1984), the Board held that it would condition deferral on the arbitrator having adequately considered the unfair labor practice issue, which is satisfied if: the contractual issue is factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Id.* at 574. The Board stated that it will not require an arbitrator's award to be totally consistent with Board precedent; however, deferral will not be found appropriate under the clearly repugnant standard where the arbitration award is "palpably wrong" or "not susceptible to an interpretation consistent with the Act." *Id.* Under *Spielberg*, *supra*, and *Olin Corp.*, *supra*, the burden of proof is on the party opposing deferral to the arbitration award. *Airborne Freight Corp.*, 343 NLRB 580, 581 (2004).

The Board revised deferral policy in *Babcock & Wilcox Construction Co.*, *supra*. Its analysis held that the existing post-arbitral deferral standard did not adequately balance the protection of employee rights in Section 8(a)(3) cases and the national policy of encouraging arbitration of disputes concerning the application or interpretation of collective-bargaining agreements. The Board found the *Olin* standard created an excessive risk of deferral when an arbitrator had not adequately considered the issue of the unfair labor practice, or when it was simply impossible to determine whether that issue had been considered by the arbitrator.

In *Babcock*, the Board created a new standard for deferring to arbitral decisions in Section 8(a)(3) and (1) cases. The burden of proof now shifted to the party urging deferral instead of the party opposing deferral. *Id* at 1130–1131. This standard is a multi-pronged approach, finding that post-arbitral deferral is appropriate when:

- (1) the arbitration procedures appear to have been fair and regular;
- (2) the parties agreed to be bound; and,
- (3) the party urging deferral demonstrates that:
 - (a) the arbitrator was explicitly authorized to decide the unfair labor practice issue;
 - (b) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and
 - (c) Board law “reasonably permits” the arbitral award.

Id at 1131.

Under the first two prongs of *Babcock*, I find that the arbitration procedures appear fair and regular and the parties agree to be bound through their collective-bargaining agreement. However, the third prong precludes deferral to the arbitrator’s decision. The collective-bargaining agreement has no provisions to allow the arbitrator to consider anything extra-contractual, such as an unfair labor practice, and the arbitrator so found. The Union precluded presentation of evidence related to the unfair labor practice, despite Evans’ attempt to divert attention to the unfair labor practice allegation. Based upon Respondent’s inability to prove the arbitrator was authorized to decide the unfair labor practice issue, deferral is inappropriate under the present standard.³⁶ As for the Respondent’s request return to *Spielberg/Olin* standards, I am constrained to follow current Board law.³⁷

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.
2. The following are Respondent’s supervisors within the meaning of Section 2(11) of the Act and/or agents within the meaning of Section 2(13) of the Act:

a. Arnold Ayikwei	supervisor
b. Robert Buckingham	supervisor
c. Bobby Clark	supervisor
d. Burt Barton	Operational support/safety supervisor
e. Kevin Bush	manager
f. Onur Orcun	Director, Byhalia warehouse
g. Curt Youngdale	Labor Relations Director
h. Cynthia Hayes	HR business partner specialist
i. Lonny Otto	HR director, Byhalia warehouse (2016-2017)
j. Tess Thomas	HR director, service market logistics
k. Leslie Thompson	HR director, Byhalia warehouse (2015-2016)

³⁶ Even earlier deferral cases would find the remedy here repugnant to the Act as the correct remedy here would require Evans to be reinstated and made whole. *Consumer Power Co.*, 282 NLRB at 137.

³⁷ The Board requested briefs on the deferral issues in *United Parcel Service, Inc.*, (unpublished dec.) Case 06–CA–143062 (March 15, 2019).

3. The United Auto Workers and its local, Local 2406, are labor organizations within the meaning of Section 2(5) of the Act.

4. Respondent violated Section 8(a)(3) and (1) of the Act by:

- a. On March 23, 2016, issuing a written warning to Walter Evans because of his union activities and/or engaging in other protected concerted activities.
- b. On May 3, 2016, suspending Walter Evans because of his union activities and/or engaging in other protected concerted activities;
- c. On March 20, 2017, terminating Walter Evans because of his union activities and/or engaging in other protected concerted activities.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act in any other way.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent unlawfully disciplined and terminated Walter Evans, it must offer him reinstatement to the position from which he was unlawfully termination. Respondent is to offer Walter Evans reinstatement in the position that he previously worked, or if such position no longer exists, in a substantially equivalent position. We shall further order the Respondent to make Walter Evans whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall order the Respondent to compensate Walter Evans for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In accordance with the Board's decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall be ordered, within 21 days of the dates the amounts of backpay are fixed, either by agreement or Board order, to submit and file the appropriate documentation allocating the backpay awards to the appropriate calendar quarters or periods (reports allocating backpay) with the Regional Director. Respondent will be required to allocate backpay to the appropriate calendar years only. The Regional Director then will assume responsibility for transmission of the reports to the Social Security Administration at appropriate times and in the appropriate manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁸

³⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted

ORDER

Respondent Volvo of Byhalia, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

- a. Disciplining employees because of their support for and activities on behalf of the Union and/or protected concerted activities.
- b. Terminating employees because of their support for and activities on behalf of the Union and/or protected concerted activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

- a. Within 14 days of this Order, offer Walter Evans full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileged previously enjoyed.
- b. Make Walter Evans whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, pursuant to the methods in the Remedy section of this decision.
- c. Compensate Walter Evans for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 15, within 21 days of the dates the amount of backpay is fixed, either by agreement or Board order, reports allocating the backpay award to the appropriate calendar years(s).
- d. Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary actions and March 20, 2017 termination of Walter Evans and within 3 days thereafter notify Evans in writing that this has been done and the disciplinary actions and termination will not be used against him in any way.
- e. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- f. Within 14 days after service by the Region, post at its facility in Byhalia, Mississippi, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. The notice will also be posted in English and any other languages that the Regional Director finds appropriate. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means if Respondent regularly communicates with employees through those means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since March 23, 2016.

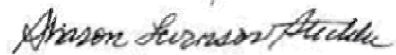
by the Board and all objections to them shall be deemed waived for all purposes.

- g. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that Respondent has taken to comply.

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Washington, D.C. April 30, 2019

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Sharon Levinson Steckler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated federal labor law and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT discipline you because you engaged in Union and/or protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you because of your support for and activities on behalf of the Union and/or protected concerted activities.

WE WILL NOT, in any like or other related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Walter Evans full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

WE WILL make Walter Evans whole for any loss of earnings and other benefits resulting from his termination, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Walter Evans for the adverse tax consequences, if any of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for Walter Evans.

WE WILL remove from our files all references to the unlawful disciplinary actions and termination of Walter Evans and WE WILL notify him in writing that his has been done and that they will not be used against him in any way.

Volvo Group North America, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.
600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3408
(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/15-CA-179071 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389.